property that diverts and entertains the public, satisfies all aspects of the Virginia Supreme Court's definition of a recreational facility for purposes of section 15.2-1809.

B. Marshall was acting in the operation of a recreational facility at the time of the accident.

The Court must also determine whether Marshall's operation of the van at the time of the accident was part of the City's operation of the Boxing Center. In a similar case, a refuse truck owned by the City of Hampton ("Hampton") hit the plaintiff's vehicle while the plaintiff was stopped at a traffic light. *Decker*, 260 Va. at 68, 531 S.E.2d at 310. At the time of the accident, a Hampton employee, Harlan, was driving the truck to an incineration plant in the course of his employment with the Hampton Coliseum (the "Coliseum"). *Id.* After concluding that the Coliseum is a recreational facility pursuant to section 15.2-1809, the Virginia Supreme Court addressed whether Harlan's driving of the truck was part of the maintenance or operation of the Coliseum under the statute. *Id.* at 69, 531 S.E.2d at 310–11.

In reaching its holding that Harlan was acting in the operation of a maintenance facility under section 15.2-1809, the Virginia Supreme Court considered several factors. First, it observed that Harlan's job responsibilities—as a Hampton employee at the Coliseum—included driving the truck to a nearby plant for incineration. *Id.* at 70, 531 S.E.2d at 311. Similarly, as a Recreation Specialist at the Boxing Center, part of Marshall's job included transporting boxing program participants to their homes after practice. Second, the court noted that the Coliseum could not operate without trash removal, and that trash removal was part of the building's regular maintenance. *Id.* Although the City has not argued that the Boxing Center could not operate without offering transportation services, it does claim that "[m]any of these individuals [taking

advantage of the transportation services] are burdened with financial and transportation challenges and would not be able to participate in activities at the Boxing Center without this assistance." The City also points out that the Boxing Center provided this service for many years.

Third, and finally, the Virginia Supreme Court observed that Hampton "assigned" the truck to the Coliseum for the specific purpose of transporting trash generated by the Coliseum to the plant for incineration. *Id.* Likewise, the City in this case assigned the van to the Boxing Center. The City does not explicitly claim that it provided the van in order to offer transportation services; however, it seems reasonable to infer that the City issued the Boxing Center a *passenger* van to enable the Boxing Center to provide a transportation service that it offered for many years. The Virginia Supreme Court summarized its holding in *Decker* by stating that "the removal of trash created by the use of the recreational facility was a necessary and essential aspect of the maintenance or operation of the Coliseum." *Id.* The City has not specifically argued that the transportation service the Boxing Center offers is necessary or essential to the Boxing Center's operation. However, the statute refers only to acts or omissions that occur "in the maintenance or operation" of a recreational facility. *Va. Code Ann.* § 15.2-1809. It does not specify—and the Virginia Supreme Court has not explicitly held—that immunity only applies if the operation or maintenance was necessary or essential to the recreational facility's operation.

The City, in fact, points out that several Virginia Supreme Court cases support an assertion that "immunity applies to all aspects related to the maintenance and operation of

a recreational facility."[4] (Plea in Bar 9 (citing *City of Lynchburg v. Brown*, 270 Va. 166, 171, 613 S.E.2d 407, 410 (2005) (holding that the negligence in the operation or maintenance was city employees "failing to observe the damaged bleacher" in a particular park); *Hawthorn*, 253 Va. at 287, 484 S.E.2d at 605 (holding that the negligence in the operation or maintenance was the city's "failure to provide a barrier or guardrail" or post warning signs by a cliff in a local park); *Frazier*, 234 Va. at 393, 362 S.E.2d at 691 (holding that the negligence in the operation or maintenance was the city's "failure to install protective devices or to post warnings" at the edge of a platform)).) These cases reinforce the argument that, despite the Virginia Supreme Court's wording in *Decker*, a negligent act or omission occurring in the maintenance or operation of a recreational facility does not need to be explicitly necessary or essential to the functioning of the recreational facility in order for section 15.2-1809 to apply.

The facts in the instant case closely resemble those in *Decker*. In both cases, a city assigned a vehicle to a recreational facility for a particular purpose. A city employee drove the vehicle for that purpose in the course of his normal job duties and as part of the regular functions carried out by the recreational facility. Although in this case it is not clear whether the Boxing Center's transportation service is "necessary," such a finding is not required in order for immunity to attach. It is likely sufficient that (1) the Boxing Center offered the service, (2) the City assigned the van used for that service to the Boxing Center, (3) a Boxing Center—and therefore a city—employee drove the van as part of the service, (4) the Boxing Center offered the service for many years, and (5)

[4] The City also cites dictionary definitions of "operation" and "maintenance" to bolster its argument; however, there is clearly sufficient case law available from the Virginia Supreme Court addressing similar concerns relating to the application of section 15.2-1809.

many individuals needed the service in order to enjoy the entertainment and diversion offered by the Boxing Center. The Court should therefore find that Marshall was engaged in the operation of that recreational facility pursuant to section 15.2-1809.

RECOMMENDATION

The Court should sustain the City's plea in bar. Plaintiffs allege claims of ordinary negligence only, the parties agree that Marshall was an employee and agent of the City, and the City clearly operates the Boxing Center. The Boxing Center is a physical location owned and operated by the City which provides entertainment and diversion to the public. The incident occurred while Marshall was driving a city-owned vehicle as part of a transportation service the Boxing Center offered for many years to support its public diversion and entertainment function. Pursuant to section 15.2-1809 of the *Code of Virginia*, the City is immune to liability in these proceedings and the Court should therefore dismiss the City as a defendant in these cases.

Applicant Details

First Name	**Adam**
Middle Initial	**W**
Last Name	**Mitchell**
Citizenship Status	**U. S. Citizen**
Email Address	**awm83@georgetown.edu**
Address	**Address** Street **424 Canewood Place** City **Mauldin** State/Territory **South Carolina** Zip **29662** Country **United States**
Contact Phone Number	**5036864664**

Applicant Education

BA/BS From	**Pomona College**
Date of BA/BS	**May 2018**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**June 9, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Krishnakumar, Anita
anita.krishnakumar@georgetown.edu
Ohm, Paul
ohm@law.georgetown.edu
Thomas, John
jrt6@law.georgetown.edu
202-662-9407

References

Krissy D. McKenna
Former Law Clerk to the Honorable Kathleen M. O'Malley
United States Court of Appeals for the Federal Circuit
146 Athens St. Apt. 2
Boston, MA 02127
Phone: (978) 766-8354
Email: kmckenna@orrick.com
Ms. McKenna was one of my direct supervisors in Judge O'Malley's chambers.

Dr. Chengxing Zhai
Senior Engineer and Data Analyst
NASA Jet Propulsion Laboratory
4800 Oak Grove Drive
Pasadena, CA 91109
Phone: (818) 393-0758
Email: chengxing.zhai@jpl.nasa.gov
Dr. Zhai was my direct supervisor at NASA JPL. He is also co-director of the JPL Near-Earth Asteroid synthetic tracking project.

Dr. Philip Choi

Chair and Associate Professor
Pomona College Department of Physics and Astronomy
610 N College Ave
Claremont, CA 91711
Phone: (909) 607-0890
Email: philip.choi@pomona.edu
Dr. Choi and I worked together on the NASA JPL Near-Earth Asteroid project from 2014 to 2018. He was also my thesis advisor, academic advisor, and professor for both Observational Methods of Astrophysics and Advanced Introduction to Astronomy.

Ricardo Townes
Former Associate Dean of Students and Judicial Advisor
Pomona College
1869 Coolcrest Ave
Upland, CA 91784
Phone: (413) 530-9816
Email: mricardot@gmail.com
Dean Townes and I worked on the College's Judicial Council from 2016 through 2018. He represented the College before the Council and decided which charges to bring against students.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ADAM MITCHELL
424 Canewood Place, Mauldin, SC 29662 • awm83@georgetown.edu • (503) 686 – 4664

Monday, June 14, 2021

The Honorable Elizabeth Hanes
United States Magistrate Judge
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am an incoming first-year associate at Covington & Burling's Washington, D.C. office, and this past year, I served as Managing Editor of the *Georgetown Law Journal*. I write to apply for a 2022–2024 clerkship in your chambers. Because I plan to practice in Washington, D.C. and my family lives nearby, clerking for your honor would be ideal both personally and professionally.

The large volume of patent cases heard by the U.S. District Court for the Eastern District of Virginia is one of the primary reasons I seek a clerkship with your honor. I attended law school to pursue patent law, which I view as the intersection of science and law. My interest in science was cemented in my undergraduate studies, during which I led a division of the near-Earth object detection program at NASA's Jet Propulsion Laboratory. This experience culminated in co-authoring an article in *The Astronomical Journal*, which analyzed the capabilities, benefits, and drawbacks of a new technology to detect near-Earth objects. My interest in law formed principally through officiating semi-professional soccer games because I think that the work of referees and judges—the interpretation and application of laws—is similar. The combination of these two interests motivates me to pursue a clerkship, with a special emphasis on patent law.

My unique background would enable me to be a successful clerk. For example, studying physics at a liberal arts college emphasized the skills not only to understand complex technical concepts but also to clearly communicate them to people without technical backgrounds. Further, being the first in my family to attend college demonstrates my ability to persevere and to tackle new, unfamiliar situations. Finally, while interning for Judge Kathleen M. O'Malley, I learned how to effectively draft bench memoranda and recommendations on petitions for rehearing en banc, research the merits of pending cases, and contribute to in-chambers discussions. Similarly, interning for Judge Randolph D. Moss exposed me to the fast-paced dockets of U.S. district judges. Both internships, combined with my experience taking Patent Appeals at the Federal Circuit, taught in part by Judge Prost, provide a foundation for me to be a successful clerk.

Enclosed, please find my resume, transcripts, and writing sample. Additionally, please find attached letters of recommendation from Georgetown Law Professors Anita Krishnakumar and John Thomas and from Associate Dean Paul Ohm. I would be glad to provide any additional information if needed. Thank you for your consideration, and I hope to hear from you soon.

Respectfully,

Adam Mitchell

ADAM MITCHELL

424 Canewood Place, Mauldin, SC 29662 • awm83@georgetown.edu • (503) 686 – 4664

EDUCATION

Georgetown University Law Center — Washington, DC
Juris Doctor, *cum laude* — June 2021
GPA: 3.65
Journal: Managing Editor, *The Georgetown Law Journal*
Honors: CALI Award and A+ in Legislation and Statutory Interpretation; Milton Kaufman Award for *Georgetown Law Journal* Service; Glenn J. Pfadenhauer Endowed (Intellectual Property) Scholarship; Opportunity Scholarship
Activities: Giles S. Rich American Inn of Court Pupil Member, Technology Law and Policy Scholar, Student Intellectual Property Law Association Member, Teaching Assistant for Beginning Computer Programming for Lawyers, RISE Teaching Fellow, First Generation Student Union Member

Pomona College — Claremont, CA
Bachelor of Arts, Physics (with a Concentration in Astrophysics) — May 2018
GPA: 3.83
Thesis: *On the Observation and Analysis of Near-Earth Objects Using Synthetic Tracking*
Honors: Tileston Physics Prize, Brackett Astronomy Prize, Moncrieff Astronomy Prize, Achievement Rewards for College Scientists Scholar, Ted Gleason (Community) Award, Cecil H. Short (Service and Performance) Prize
Activities: Department of Physics and Astronomy Liaison, Teaching Assistant, Peer Mentor, Orientation Leader, Band and Orchestra Member, Planetarium Developer and Presenter

EXPERIENCE

Covington & Burling LLP — Washington, DC
Associate — Expected Start September 2021

Summer Associate — June 2020 – July 2020
- Drafted a motion in limine to exclude expert testimony in a patent trial.
- Drafted memoranda on issues in pending cases involving administrative law, claim construction, and appellate review.

United States District Court for the District of Columbia — Washington, DC
Judicial Intern for the Honorable Randolph D. Moss — January 2020 – April 2020

United States Court of Appeals for the Federal Circuit — Washington, DC
Judicial Intern for the Honorable Kathleen M. O'Malley — May 2019 – August 2019

NASA Jet Propulsion Laboratory — Pasadena, CA
Team Director, Analyst, and Observer — October 2014 – May 2018
- Directed a team of students to observe and determine the orbits of near-Earth asteroids using synthetic tracking.
- Developed the software of the one-meter telescope at NASA's Table Mountain Observatory, including a Python-based automated target selection and tracking code.

Pomona College — Claremont, CA
Judicial Council; Chair, Appeals Chair, and Member — September 2014 – May 2018
- Presided over and wrote the opinion of the Council, which has authority up to and including expulsion, in each case.
- Served on several committees, including the Title IX and Speech Committees, and advised the Board of Trustees.

Academy for Youth Success, Instructor — May 2016 – August 2016
- Designed and taught a physics and astrophysics course to underrepresented, high-achieving high school students.

PUBLICATIONS

Note, *State Liability for Orbital Modification of a Near-Earth Object*, 52 GEO. J. INT'L L. (forthcoming 2021).

Note, *A Practical and Contextual Analysis of Interlocutory Appeals at the ITC*, 44 337 REP.: PAUL J. LUCKERN SUMMER ASSOCIATE EDITION 85 (2020) (with John Veiszlemlein).
- Selected as one of the three outstanding pieces in the edition by the Editorial Board.

Accurate Ground-Based Near-Earth Asteroid Astrometry Using Synthetic Tracking, 156 ASTRONOMICAL J. 65 (2018) (with Chengxing Zhai et al.).

5Cs Must Support Autistic Students, STUDENT LIFE (Mar. 3, 2017, 11:45 AM), https://tsl.news/opinions6530.

ADDITIONAL INFORMATION

Former Professional Affiliations: American Astronomical Society; Sigma Xi: Scientific Research and Honor Society
Technical Skills: MatLab, Mathematica, Maple, Python, Unix, IRAF, DS9 Image Processing, LaTeX
Certifications: United States Soccer Federation – Regional Referee (Qualified to officiate semi-professional matches)

Record of: Adam Wade Mitchell
GUID: 828603462

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 09, 2021
Georgetown University Law Center
Major: Law/Technology Law Scholars
Honors: Cum Laude

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
---------- Fall 2018 ----------							
LAWJ	001	95	Civil Procedure Jonathan Molot	4.00	B+	13.32	
LAWJ	002	95	Contracts Anna Gelpern	4.00	A-	14.68	
LAWJ	004	53	Constitutional Law I: The Federal System Paul Smith	3.00	B+	9.99	
LAWJ	005	50	Legal Practice: Writing and Analysis Frances DeLaurentis	2.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	37.99	3.45
Cumulative	11.00	11.00	37.99	3.45

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
---------- Spring 2019 ----------							
LAWJ	003	52	Criminal Justice Louis Seidman	4.00	A-	14.68	
LAWJ	005	50	Legal Practice: Writing and Analysis Frances DeLaurentis	4.00	A-	14.68	
LAWJ	007	95	Property Michael Gottesman	4.00	B+	13.32	
LAWJ	008	95	Torts John Hasnas	4.00	B+	13.32	
LAWJ	1323	50	International Law, National Security, and Human Rights Milton Regan	3.00	A-	11.01	

Dean's List 2018-2019

	EHrs	QHrs	QPts	GPA
Current	19.00	19.00	67.01	3.53
Annual	30.00	30.00	105.00	3.50
Cumulative	30.00	30.00	105.00	3.50

Program Changed to:
Major: Law/Technology Law Scholars

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
---------- Fall 2019 ----------							
LAWJ	025	05	Administrative Law Laurence Silberman	3.00	A	12.00	
LAWJ	121	01	Corporations Michael Diamond	4.00	B	12.00	
LAWJ	1516	05	Tech Law Scholars Seminar II Alexandra Givens	1.00	IP	0.00	
LAWJ	332	01	Patent Law John Thomas	3.00	A-	11.01	
LAWJ	361	01	Professional Responsibility Dolores Dorsainvil	2.00	B+	6.66	

----------Continued on Next Column----------

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	41.67	3.47
Cumulative	42.00	42.00	146.67	3.49

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
---------- Spring 2020 ----------							
LAWJ	1429	05	Patent Appeals at the Federal Circuit Arthur Gajarsa	3.00	P	0.00	
LAWJ	1491	15	Externship I Seminar (J.D. Externship Program) Morris Parker		NG		
LAWJ	1491	95	~Seminar Morris Parker	1.00	P	0.00	
LAWJ	1491	97	~Fieldwork 3cr Morris Parker	3.00	P	0.00	
LAWJ	1516	05	Tech Law Scholars Seminar II Alexandra Givens	2.00	P	0.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Susan Bloch	4.00	P	0.00	
LAWJ	406	09	Space Law Seminar Steven Mirmina	3.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	16.00	0.00	0.00	0.00
Annual	28.00	12.00	41.67	3.47
Cumulative	58.00	42.00	146.67	3.49

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
---------- Fall 2020 ----------							
LAWJ	015	05	American Legal History Daniel Ernst	3.00	A-	11.01	
LAWJ	165	09	Evidence Tanina Rostain	4.00	A	16.00	
LAWJ	267	05	Law of Cyberspace Michael Songer	3.00	A	12.00	
LAWJ	304	05	Legislation Anita Krishnakumar	3.00	A+	12.99	

Dean's List Fall 2020

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	52.00	4.00
Cumulative	71.00	55.00	198.67	3.61

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
---------- Spring 2021 ----------							
LAWJ	036	08	Advanced Legal Writing and Practice for Judicial Clerks and Civil Litigators Johanna Hickman	2.00	A	8.00	
LAWJ	040	05	Advanced Patent Law Seminar John Thomas	3.00	A-	11.01	
LAWJ	1499	05	Computer Programming for Lawyers: Intermediate Paul Ohm	3.00	A	12.00	
LAWJ	178	05	Federal Courts and the Federal System David Vladeck	3.00	A-	11.01	
LAWJ	334	05	Patent Trial Practice Robert Altherr	3.00	P	0.00	

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Adam Wade Mitchell
GUID: 828603462

---------- **Transcript Totals** ----------

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	42.02	3.82
Annual	27.00	24.00	94.02	3.92
Cumulative	85.00	66.00	240.69	3.65

---------- **End of Juris Doctor Record** ----------

Unofficial Transcript
Pomona College

Name: Adam Wade Mitchell
Student ID: 10311694
DOB(MM/DD): 06/01
Curr Enr Stat: Graduated
Sex: M
Academic Stat: Good standing
Class: Graduated
Plan Grad Sess/Yr: Spring Term 2018
Degree Date: 05/13/18
Degree: Bachelor of Arts
Advisor: Choi, Philip I.
Major(s): Physics
Printed 10/08/20

Fall Term 2014

ID 001	PO	Critical Inquiry Seminar: Telling Stories	1.00	A-
MATH031H	PO	Honors Topics in Calculus II	1.00	A
MUS 033	PO	Pomona College Orchestra	0.50	P
PE 076	JP	Yoga-Hatha	0.25	P
PHYS070	PO	Spacetime, Quanta, Entropy w/Lab	1.00	A
PHYS070	LPO	Lab, Spacetime, Quanta, Entropy	0.00	X
SPAN033	PO	Intermediate Spanish	1.00	A-

12/19/2014 Pomona College Scholar

	EARNED	IN GPA	GPA POINTS	GPA
sess	4.75	4.00	46.00	11.500
cum	4.75	4.00	46.00	11.500

Spring Term 2015

ASTR051	PO	Advanced Introductory Astronomy	1.00	A
MATH060	PO	Linear Algebra	1.00	B-
PE 175M	PO	Vars Team: Track & Field Men	0.25	P
PHIL081	PO	Epistemology	1.00	A-
PHYS071	PO	Introductory Classical Mechanics	0.50	A-
PHYS072	PO	Introduc Electricity & Magnetism	0.50	A-

	EARNED	IN GPA	GPA POINTS	GPA
sess	4.25	4.00	42.00	10.500
cum	9.00	8.00	88.00	11.000

Fall Term 2015

ASTR101	PO	Techn in Observtnal Astrophysics	1.00	A-
MATH032S	PO	Calc III w/Apps to Life Sciences	1.00	A
PHYS101	PO	Foundatns of Modern Phys w/Lab	1.00	A
PHYS101	LPO	Lab, Foundations Modern Physics	0.00	X
PSYC051	PO	Intro to Psychological Science	1.00	A

12/18/2015 Pomona College Scholar

	EARNED	IN GPA	GPA POINTS	GPA
sess	4.00	4.00	47.00	11.750
cum	13.00	12.00	135.00	11.250

Spring Term 2016

ASTR062	HM	Introduction to Astrophysics	1.00	A+
CSCI051	PO	Intro to Computer Science w/Lab	1.00	B+
CSCI051	LPO	Lab, Intro to Computer Science	0.00	X
MUS 035	PO	Pomona College Band	0.50	P
PHYS125	PO	Mechanics	1.00	A
PHYS128	PO	Electronics with Laboratory	1.00	A

To be continued

	EARNED	IN GPA	GPA POINTS	GPA
sess	4.50	4.00	46.00	11.500
cum	17.50	16.00	181.00	11.312

Fall Term 2016

MUS 035	PO	Pomona College Band	0.50	P
PHYS108	KS	Programming for Science+Engineer	1.00	A+
PHYS115	KS	Statistical Physics Computal App	1.00	B+
PHYS182	PO	Experimental Atmospheric Physics	1.00	A

	EARNED	IN GPA	GPA POINTS	GPA
sess	3.50	3.00	34.00	11.333
cum	21.00	19.00	215.00	11.315

Spring Term 2017

AREA1MUS		AREA 1 - Applied Music	0.00	WV
ASTR122	HM	High Energy Astrophysics	0.50	A
ASTR124	HM	Planetary Astrophysics	0.50	A-
EDUC171G	CG	Intro Public School Teachng:STEM	1.00	A
MUS 035	PO	Pomona College Band	0.50	P
PHYS139	PO	Mathematical Methods of Physics	1.00	A
PHYS142	PO	Electricity & Magnetism	1.00	A

05/12/2017 Pomona College Scholar

	EARNED	IN GPA	GPA POINTS	GPA
sess	4.50	4.00	47.50	11.875
cum	25.50	23.00	262.50	11.413

Fall Term 2017

MUS 035	PO	Pomona College Band	0.50	P
MUS 060	PO	History of Jazz	1.00	A
PE 078	PO	Ultimate Frisbee	0.25	P
PHYS160	PO	Intro to General Relativity	1.00	A
PHYS190	PO	Senior Seminar	1.00	A

12/15/2017 Pomona College Scholar

	EARNED	IN GPA	GPA POINTS	GPA
sess	3.75	3.00	36.00	12.000
cum	29.25	26.00	298.50	11.480

Spring Term 2018

MUS 035	PO	Pomona College Band	0.50	P
PHIL034	PO	Philosophy of Law	1.00	A
PHYS191E	PO	Senior Thesis (Experimental) On Near-Earth Objects and Synthetic Tracking	1.00	B+
PHYS193	PO	Senior Comprehensive Examination	0.00	P
PSYC132	SC	Autism Spectrum	1.00	A+

To be continued

Printed on 10/08/2020

Unofficial Transcript
Pomona College

Name: Adam Wade Mitchell Student ID: 10311694

THEA001A PO Basic Acting:Tools & Fundamentls 1.00 A

	EARNED	IN GPA	GPA POINTS	GPA
sess	4.00	4.00	46.00	11.500
cum	33.25	30.00	344.50	11.483

Pomona College
Degree: Bachelor of Arts
Awarded: 05/13/2018
Major(s): Physics

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It gives me great pleasure to recommend Adam Mitchell, who has applied to serve as a law clerk in your chambers. Adam is extraordinarily smart, diligent, and thoughtful—a stellar student and a terrific human being. I can say without reservation that he would make an excellent law clerk and a wonderful colleague.

I got to know Adam during the fall semester of 2020, when I taught a course in Legislation and Statutory Interpretation to a small group of 23 students as a Visiting Professor at Georgetown University Law Center. During that (virtual) semester, I spoke regularly with Adam in office hours and in class. I found Adam to be incredibly sharp, quick, and deeply insightful in his comments and questions. Given the small class size and the nature of our discussions, Adam spoke regularly and I had many opportunities to engage him in dialogues about the course matter. Adam was always exceptionally well-prepared, nuanced in his analysis of cases and doctrines, and unusually perceptive and clear-thinking. He excelled both at commenting on individual cases and at evaluating larger theoretical and normative questions raised in the course. And he consistently provided some of the best comments in the class. It was an absolute pleasure to have Adam in class—he was one of those rare students I knew I could count on to provide valuable insights irrespective of the subject matter or its difficulty. Unsurprisingly, at the end of the semester Adam wrote what was by far the best exam in the class and earned the highest grade in the course—an A+. If he were not graduating, I would ask him to serve as my research assistant next fall when I join the Georgetown faculty full time.

Beyond his excellence in the classroom, Adam is a wonderful human being and a delight to interact with. He is thoughtful and generous to his classmates—incredibly smart as well as a team player. His commitment to his fellow classmates was evident in multiple contexts, including his service as a RISE Teaching Fellow—a program through which he mentored fellow law students from underrepresented backgrounds and provided advice about study skills, class preparation, and exam writing. (Adam is the first in his family to attend college and wanted to help others from nontraditional backgrounds succeed in law school).

In short, Adam would make a terrific law clerk—he is sharp, diligent, mature, reliable, and a joy to work with. He also is an incredibly hard-worker—in addition to maintaining excellent grades during law school, he has served as the Managing Editor of the Georgetown Law Journal (perhaps the most time-consuming position on the editorial board), worked as a judicial intern for two different judges, and served as a Teaching Assistant, RISE Teaching Fellow, and member of several student organizations including the First Generation Students Union.

Adam is very interested in clerking and will excel at the job if given the chance. If you give him the opportunity, I have no doubt that he will be one of your hardest workers, as well as a thoughtful and respected colleague. He is an excellent student and human being, and I expect that he will have a very successful legal career. I hope that he gets the chance to begin it by working for you.

Thank you for considering this recommendation, and please let me know if I can provide any additional information about Adam that would assist you.

Sincerely yours,

Anita S. Krishnakumar
Mary C. Daly Professor of Law
St. John's University School of Law
krishnaa@stjohns.edu
(917) 592-4561

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend Adam Mitchell for a clerkship in your chambers. Adam is a brilliant and hard-working student, one who is destined to be a fantastic lawyer and would make an excellent judicial law clerk.

Adam's training, expertise, and skillset would be especially helpful to a judge hearing cases at the cutting edge of technology or science, as I am well-positioned to understand. I helped create Georgetown's programs in Technology Law & Policy, for example serving as the Faculty Director for our relatively new Institute for Technology Law & Policy, Center on Privacy and Technology, and masters degree programs in Technology Law. These programs have started to attract talented and credentialed scientists and technologists to our student body, but Adam's education and work as an Astrophysicist at NASA/JPL stand out even among our talented cohort of future scientist/lawyers.

My main interaction with Adam has been through my innovative course, Computer Programming for Lawyers. Given his prior experience as a Python programmer, Adam enrolled in the Intermediate version of the course, which required him to serve as a Teaching Assistant for the beginning students and to develop an independent research project. From observing and advising this work, I can speak with authority about Adam's technical prowess and work ethic, but not directly about his knowledge of the law. I trust his other reviewers will fill in that gap.

For Adam's final project for this class, he attempted to automate the work of the Georgetown Law Journal, our flagship journal for which Adam served as member and managing editor. Each year, the journal publishes a 1300-page treatise, the Annual Review of Criminal Procedure. The work begins with a painstaking and tedious task, copying every single footnote from the issue into a spreadsheet, together with the corresponding text proposition. Adam proposed to automate this process, imbuing a computer program with semi-intelligent knowledge about the punctuation and grammar clues that demarcated the end of one proposition and the start of the next.

When Adam first pitched this project, it seemed wildly ambitious and for that reason too much for what was meant to be only part of what this course required. Adam stuck with the project, motivated by both the amount of time and drudgery the project would help save scores of future student editors and the creative challenges of solving hard technical problems. Along the way, he encountered tricky setbacks and unanticipated difficulties, all of which he managed to surmount. The final project was a great success, fulfilling the original brief in full, and I am optimistic his code will be used by the journal for years to come.

Adam's work on this project demonstrated many skills that would serve him well as a judicial law clerk: hard work, attention to detail, creative problem solving, and drive. Furthermore, as a Teaching Assistant, he proved to be organized, compassionate, and a skilled teacher, abilities that would translate well to the camaraderie and teamwork necessary in the close quarters of a chambers. He is a kind and affable person, someone you will be happy to be around.

I understand that this is not a typical letter from a law professor, as I do not have direct experience advising Adam's work in a traditional law school class. I do believe, however, that for a judge with technical or scientific issues in his or her docket, a clerk with the Adam's skills and abilities would be invaluable. From what I have seen, Adam will make a fantastic law clerk, and I recommend him without hesitation.

Please contact me if you have any questions.

Sincerely,

Paul Ohm

Paul Ohm - ohm@law.georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 15, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am pleased to write this letter of recommendation on behalf of Adam Mitchell. Mr. Mitchell is a former NASA scientist who has compiled a strong record at Georgetown Law. I believe that he would serve admirably as a law clerk and strongly encourage you to consider his application.

I first met Mr. Mitchell when he enrolled in my basic patents class. He participated actively and brought a great deal of energy into the classroom. He possessed a superior ability to comprehend difficult concepts and texts, and was a perceptive, disciplined student who made the most of his opportunities at Georgetown. Against a pool of talent including former patent examiners and current full-time patent agents, he was highly successful in the course. I was not surprised to learn that Mr. Mitchell was elected by his peers to serve as the Managing Editor of the *Georgetown Law Journal*.

Mr. Mitchell also enrolled in my advanced patent law seminar, where he drafted a sophisticated paper that surveyed the remedial landscape of modern patent law alongside current legislative reform proposals. Titled *An Analysis of Post-*eBay *Legislative Reform Proposals for Permanent Injunctions*, the paper masterfully wove together a review of the leading case law, stakeholder reactions, draft legislation, and even a bit of property theory. He wrote with confidence and authority, and I was delighted to see that he picked up quite a bit of patent law that I don't teach in my introductory class.

My experiences with Mr. Mitchell allow me to draw a number of firm conclusions. He is a versatile young man, with experiences ranging from astrophysics to soccer and music, and he has excellent writing skills. He possesses strong doctrinal knowledge of patent law and related principles. "Rocket scientist" jokes aside, I also have found him to be a friendly and modest young man. I think he would serve as an asset in any chambers in which he served, particularly one with a prominent patent docket.

I would be pleased to answer any questions about Mr. Mitchell and may be reached at (202) 662-9009.

Sincerely yours,

John R. Thomas

John Thomas - jrt6@law.georgetown.edu - 202-662-9407

COVINGTON & BURLING LLP

[Redacted]

Memorandum

To: [Redacted]

From: Adam Mitchell

Re: Prosecution Disclaimer and Claim Construction in [Pending] Appeal

I. Questions Presented

A. If a patent owner makes a narrowing argument during an inter partes review, is the patent challenger required to raise the issue of prosecution disclaimer on appeal from that proceeding in order for prosecution disclaimer to apply in subsequent district court litigation?

B. Is a Federal Circuit panel that hears an appeal from a civil action bound by the claim construction of a prior Federal Circuit panel that heard an appeal from a parallel inter partes review, if both appeals involve the same patents but use different claim construction standards?

C. What effect, if any, does the claim construction of the Patent Trial and Appeal Board in an inter partes review have on the claim construction of a district court in a parallel civil action for patent infringement?

II. Executive Summary

This memorandum addresses whether, if a patent owner makes a narrowing argument during an inter partes review (IPR), the patent challenger is required to raise the issue of prosecution disclaimer on appeal from that proceeding in order for prosecution disclaimer to apply in subsequent district court litigation. Common law waiver and collateral estoppel are the two mechanisms that could, in this context, impose such a requirement on the patent challenger. But not raising an issue on appeal does not result in waiver of the issue during all subsequent proceedings and appeals. And collateral estoppel does not prevent a patent challenger from raising new claim construction arguments, including prosecution disclaimer, in subsequent district court litigation because—due to the legal standard—claim construction was not actually decided during the appeal from the IPR. This memorandum thus concludes that a patent challenger is not required to raise the issue of prosecution disclaimer on appeal from an IPR in order for prosecution disclaimer to apply in subsequent district court litigation.

This memorandum then addresses whether a Federal Circuit panel that hears an appeal from a civil action is bound by the claim construction of a prior Federal Circuit panel that heard an appeal from a parallel IPR, if both appeals involve the same patents but use different claim construction standards. Stare decisis and law of the case are the two mechanisms by which, in this context, a panel could be bound by the claim construction of a prior panel. Stare decisis likely does not bind the panel that hears the appeal from the civil action to the claim construction of the prior panel because—due to the legal standard—the two panels do not decide the same legal issue. And law of the case does not bind the panel that hears the appeal from the civil action to the claim construction of the prior panel because an IPR and a civil action for patent infringement are not the same case. Thus, this memorandum concludes that a Federal Circuit panel that hears an appeal from a civil action likely is not bound by the claim construction of a prior Federal Circuit panel that heard an appeal from a parallel IPR.

This memorandum finally addresses the effect, if any, of the Patent Trial and Appeal Board's (PTAB's) claim construction in an IPR on a district court's claim construction in a parallel civil action for patent infringement. A district court is not bound by the PTAB's claim construction. Aside from this principle, appellate courts have provided little guidance on how a district court should treat the PTAB's claim construction. But judicial practice suggests that a district court may consider the PTAB's claim construction in formulating its own. This memorandum therefore concludes that any effect of the PTAB's claim construction on a district court is subject to the district court's discretion.

III. Introduction

A. Factual Context

[Redacted]

B. Claim Construction Standards

Prior to November 13, 2018, the U.S. Patent and Trademark Office (PTO) and Article III federal courts used different standards to interpret claims. The PTO "[gave] claims their broadest reasonable construction 'in light of the specification as it would be interpreted by one of ordinary skill in the art.'" *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc) (quoting *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004)). By contrast, federal courts gave claims "their ordinary and customary meaning . . . to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application." *Id.* at 1312–13 (citations omitted).

On and after November 13, 2018, the PTO and federal courts use the same standard—the ordinary-meaning standard articulated in *Phillips*—to interpret claims. *See* 32 C.F.R. § 42.100(b) ("In an inter partes review proceeding, a claim of a patent . . . shall be construed using the same claim construction standard that would be used to construe the claim in a civil action . . . , including construing the claim in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art . . . ."); Changes to the Claim Construction

Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board, 83 Fed. Reg. 51,340, 51,340 (Oct. 11, 2018) ("This rule is effective on November 13, 2018 and applies to all IPR, [post-grant review] and [covered business method] petitions filed on or after the effective date."). If an IPR petition was filed before November 13, 2018, however, then the PTO gives the claims in that proceeding their broadest reasonable construction—regardless of when the proceeding actually occurs. *See, e.g.*, *AC Techs. v. Amazon.com, Inc.*, 912 F.3d 1358, 1365 n.1 (Fed. Cir. 2019).

In this case, [redacted] filed IPR petitions for the [redacted] patents on [redacted]. *See supra* Section III.A.1. Thus, the PTAB in the IPR, and the Federal Circuit in the appeal from the IPR, gave the claims of the [redacted] patents their broadest reasonable construction. *See* [redacted]. By contrast, the district court in [redacted]'s infringement action against [redacted], and the Federal Circuit in the pending appeal from that action, must give the claims of the [redacted] patents their ordinary meaning under *Phillips*. *See, e.g.*, [redacted].

C. Prosecution Disclaimer

"Prosecution disclaimer 'preclud[es] patentees from recapturing through claim interpretation specific meanings disclaimed during prosecution.'" *Aylus Networks, Inc. v. Apple Inc.*, 856 F.3d 1353, 1359 (Fed. Cir. 2017) (quoting *Omega Eng'g*, 334 F.3d at 1323). The doctrine "promotes the public notice function of the [patent's] intrinsic evidence and protects the public's reliance on definitive statements made during prosecution." *Omega Eng'g*, 334 F.3d at 1324 (citing *Dig. Biometrics, Inc. v. Identix, Inc.*, 149 F.3d 1335, 1347–48 (Fed. Cir. 1998)). Although both prosecution disclaimer and prosecution history estoppel arise from statements made during prosecution, the two concepts are distinguishable. Prosecution disclaimer limits the literal scope of the claims by excluding specific meanings disclaimed during prosecution. *See Aylus Networks*, 856 F.3d at 1359. Prosecution history estoppel, by contrast, limits the application of the doctrine of equivalents by excluding subject matter disclaimed during prosecution. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 733–34 (2002).

To constitute prosecution disclaimer, a statement during prosecution that allegedly disavows claim scope must be not "vague or ambiguous" but "clear and unmistakable." *Omega Eng'g*, 334 F.3d at 1325–26; *see Aylus*, 856 F.3d at 1363 ("We have held that, 'when a prosecution argument is subject to more than one reasonable interpretation, it cannot rise to the level of a clear and unmistakable disclaimer.'" (citation omitted)). Courts have found prosecution disclaimer[1] when the examiner "did not indicate reliance on the [patentee's statement]," *Seachange Int'l, Inc. v. C-COR, Inc.*, 413 F.3d 1361, 1374 (Fed. Cir. 2005), when the patentee's "statement was unnecessary to overcome [a prior art] reference," and even when "the examiner explicitly disagreed with the patentee's statement," *Am. Piledriving Equip., Inc. v. Geoquip, Inc.*, 637 F.3d 1324, 1336 (Fed. Cir. 2011). Finally, prosecution disclaimer may attach to statements

[1] For a summary of the cases on appeal from the PTAB in which the Federal Circuit analyzed whether a statement constituted prosecution disclaimer, *see infra* Addendum.

made beyond the formal prosecution of the patent, including to statements made in post-grant proceedings such as IPRs. *Aylus Networks*, 856 F.3d at 1359.

IV. Discussion

A. Application of Prosecution Disclaimer in Subsequent District Court Litigation After an Appeal from a Parallel IPR

A patent challenger is not required to raise the issue of prosecution disclaimer on appeal from an IPR in order for prosecution disclaimer to apply in subsequent district court litigation. Common law waiver and collateral estoppel are the two mechanisms that could, in this context, impose such a requirement on the patent challenger. But because neither common law waiver nor collateral estoppel imposes such a requirement on the patent challenger, [redacted] properly raised its prosecution disclaimer argument before the district court.

1. Waiver

A patent challenger does not waive a prosecution disclaimer argument in subsequent district court litigation by not raising the argument on appeal from an earlier IPR. Waiver prevents a litigant from raising an issue on appeal that it did not raise in the proceedings below. *See, e.g.*, *Conoco, Inc. v. Energy & Envtl. Int'l, L.C.*, 460 F.3d 1349, 1358–59 (Fed. Cir. 2006) ("[E]xcept for certain circumstances, those issues not raised below . . . cannot be heard for the first time on appeal." (citing *Interactive Gift Express, Inc. v. Compuserve, Inc.*, 256 F.3d 1323, 1344–45 (Fed. Cir. 2001))). An argument may be waived in any type of appeal, including appeals from the PTAB and appeals from district courts. *See In re Nuvasive, Inc.*, 842 F.3d 1376, 1381 (Fed. Cir. 2016) (finding waiver in an appeal from the PTAB); *Conoco*, 460 F.3d at 1358–59 (finding waiver in an appeal from a district court). The purpose of waiver is to preserve the function of appellate courts as courts of review. If a litigant were permitted to raise an argument for the first time on appeal, then appellate courts would evolve from courts of review to courts of first instance. *See Interactive Gift Express*, 256 F.3d at 1344.

[Redacted] did not raise its prosecution disclaimer argument before the Federal Circuit panel that heard its appeal from the PTAB. Although [redacted] discussed [redacted]'s alleged disclaimer in both the introduction and argument sections of its reply brief, [redacted] did not raise its prosecution disclaimer argument in its principal brief. *See supra* Section III.A.1. And because arguments raised for the first time in a reply brief typically are waived, *see Norman v. United States*, 429 F.3d 1081, 1091 n.5 (Fed. Cir. 2005) ("Arguments raised for the first time in a reply brief are not properly before this court. . . . Although this practice is 'not governed by a rigid rule,' we will adhere to it except 'where circumstances indicate that it would result in basically unfair procedure.'" (first citation omitted) (quoting *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990))), [redacted] waived its prosecution disclaimer argument before that panel of the Federal Circuit.

[Redacted]'s waiver of its prosecution disclaimer argument before a prior Federal Circuit panel, however, does not result in waiver of that argument in all subsequent stages of litigation. *Cf. Indep. Park Apartments v. United States*, 449 F.3d 1235, 1240–41 (Fed. Cir. 2006) (holding that a party's failure to raise an issue in a prior appeal does not result in waiver of that issue for all subsequent proceedings and appeals); *see also infra* Section IV.B.2 (concluding that an IPR and district court litigation, and any appeals therefrom, are not the same case). A contrary rule would transform the appellate court from a court of review to a court of first instance, forcing a party to anticipate and raise all arguments to the appellate court that it may raise to a district court in subsequent litigation. *See Interactive Gift Express*, 256 F.3d at 1344. Thus, the doctrine of waiver does not preclude [redacted] or another patent challenger, who did not raise the issue of prosecution disclaimer on appeal from an IPR, from raising the same issue in subsequent district court litigation.

2. Collateral Estoppel

Collateral estoppel does not preclude a patent challenger, who did not raise the issue of prosecution disclaimer on appeal from an IPR, from raising the same issue in subsequent district court litigation. Collateral estoppel bars relitigation of issues already adjudicated in an earlier proceeding if

> (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding.

Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 (9th Cir. 2006) (quoting *Kourtis v. Cameron*, 419 F.3d 989, 994 (9th Cir. 2005), *abrogated on other grounds by Taylor v. Sturgell*, 553 U.S. 880 (2008)); *see Phil-Insul Corp. v. Airlite Plastics Co.*, 854 F.3d 1344, 1353 (Fed. Cir. 2017) ("Because the application of general collateral estoppel principles is not within the exclusive jurisdiction of this court, we apply the law of the circuit in which the district court sits." (citing *Aspex Eyewear, Inc. v. Zenni Optical Inc.*, 713 F.3d 1377, 1380 (Fed. Cir. 2013))).

But the construction of the [redacted] patents' claims, including the effect of any potential prosecution disclaimer, under *Phillips* was not decided by the prior Federal Circuit panel. *See SkyHawke Techs., LLC v. Deca Int'l Corp.*, 828 F.3d 1373, 1376 (Fed. Cir. 2016) ("[I]ssue preclusion requires that 'the issues [be] actually litigated.' Because the [PTAB] applies the broadest reasonable construction of the claims [and] the district courts apply a different standard of claim construction as explored in *Phillips* . . . , the issue of claim construction under *Phillips* . . . has not been actually litigated." (quoting *In re Trans Tex. Holdings Corp.*, 498 F.3d 1290, 1297 (Fed. Cir. 2007))). Thus, claim construction under *Phillips* has not been actually litigated, and collateral estoppel does not preclude [redacted] from raising claim construction arguments, including prosecution disclaimer, in the subsequent district court litigation.

In sum, neither waiver nor collateral estoppel requires a patent challenger to raise the issue of prosecution disclaimer on appeal from an IPR in order for prosecution disclaimer to apply in subsequent district court litigation. As a result, [redacted] properly argued for prosecution disclaimer before the district court.

B. Binding Effect of a Prior Federal Circuit Panel's Claim Construction on a Subsequent Panel

A Federal Circuit panel that hears an appeal from a civil action likely is not bound by the claim construction of a prior Federal Circuit panel that heard an appeal from a parallel IPR, if both appeals involve the same patents but use different claim construction standards. Stare decisis and law of the case are the two mechanisms by which, in this context, a panel could be bound by the claim construction of a prior panel. But because neither stare decisis nor law of the case likely produces such a binding effect in this circumstance, the Federal Circuit panel that will hear [redacted]'s pending appeal from the district court likely will not be bound by the claim construction of the Federal Circuit panel that heard [redacted]'s appeal from the PTAB.

1. Stare Decisis

Stare decisis likely will not bind the panel that will hear [redacted]'s pending appeal from the district court to the claim construction of the panel that heard [redacted]'s appeal from the PTAB. Stare decisis states that, once a court decides a question of law, the same court and courts of lower rank should follow the decision in subsequent cases in which the same legal issue is raised. *See, e.g.*, *Ottah v. Fiat Chrysler*, 884 F.3d 1135, 1139–40 (Fed. Cir. 2018); *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1363 (Fed. Cir. 2012) (ruling that in a second civil action brought by the patentee, the district court and the Federal Circuit panel on appeal were bound by the claim construction of the prior Federal Circuit panel); *see also* Fed. Cir. R. 35(a)(1) (noting that only the Federal Circuit sitting en banc or the Supreme Court may overrule a precedential opinion of a panel). Stare decisis promotes consistency in the law and respect for judicial precedent but is not an inexorable command. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404–05 (2020) (describing the factors that the same court should consider before overruling its own precedent).

Although claim construction is a question of law reviewed de novo, *see, e.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372, 384 (1996), the panel that heard [redacted]'s appeal from the PTAB did not construe the claims under the *Phillips* standard, *see* [redacted] (applying the broadest reasonable construction standard). As a result, the meaning of the claims in the [redacted] patents under the *Phillips* standard is a question of law that has not been decided by a panel of the Federal Circuit. Thus, the prior panel's claim construction is not binding precedent on the panel that will hear the pending appeal because the prior panel did not decide the same legal issue that is presented in the pending appeal. *See Beacon Oil Co. v. O'Leary*, 71 F.3d 391, 395 (Fed. Cir. 1995) ("Stare decisis applies only to legal issues that were actually decided in a prior action." (citing *Schott Optical Glass, Inc. v. United States*, 750 F.2d 62, 64 (Fed. Cir. 1984))).

Panels of the Federal Circuit have held themselves to be bound by the claim constructions of prior panels, however, even when the panels have used different standards to construe the same patent. For example, in *Function Media, L.L.C. v. Kappos*, the panel, which was hearing an appeal from an inter partes reexamination at the Board of Patent Appeals and Interferences (BPAI), held that it was bound by a prior panel's claim construction, even though the prior panel construed the claims on appeal from a civil action in district court. *See* 508 F. App'x 953, 956 (Fed. Cir. 2013) (citing *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1350–51 (Fed. Cir. 2011)) (nonprecedential). *See generally Tempo Lighting, Inc. v. Tivoli, LLC*, 742 F.3d 973, 977 (Fed. Cir. 2014) (noting that, in inter partes reexaminations, the BPAI—the precursor to the PTAB—also gave claims their broadest reasonable construction). Similarly, in *Hynix Semiconductor*, the panel held that it was bound by the claim construction of a prior panel when both appeals were from civil actions in district court, even though *Phillips* had been decided between the sittings of the two panels. *See* 645 F.3d at 1351.

Function Media likely is distinguishable from this case. In *Function Media*, the second panel heard an appeal from an inter partes reexamination at the BPAI, and the prior panel heard an appeal from a civil action in district court. *See* 508 F. App'x at 956. By contrast, in this case, the second panel will hear an appeal from a civil action in district court, and the prior panel heard an appeal from an IPR at the PTAB. Further, the second panel in *Function Media* cited *Hynix Semiconductor* to justify its assertion that it was bound by the prior panel. *Id.* But *Hynix Semiconductor*, which addressed stare decisis and claim construction only in the alternative, stands only for the proposition that a subsequent panel was bound by a prior panel when both appeals involved the same claim construction standard despite *Phillips* being decided between the sittings of the two panels. *See* 645 F.3d at 1351. Finally, *Function Media* was a nonprecedential opinion. *See* 508 F. App'x at 953.

Therefore, it is unlikely that the panel that will hear [redacted]'s pending appeal from the district court will consider itself bound through stare decisis by the claim construction of the prior panel, especially because it must use a different claim construction standard than used by the prior panel. Thus, the panel that will hear [redacted]'s pending appeal from the district court likely will not be bound through stare decisis by the claim construction of the panel that heard [redacted]'s appeal from the PTAB.

2. Law of the Case

Law of the case will not bind the panel that will hear [redacted]'s pending appeal to the claim construction of the panel that heard [redacted]'s appeal from the PTAB. The common law doctrine of law of the case "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–16 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). The doctrine applies to claim construction between subsequent appeals and remand. *See, e.g.*, *E-Pass Techs., Inc. v. 3Com Corp.*, 473 F.3d 1213, 1219 (Fed. Cir. 2007) ("A claim construction articulated by a prior panel decision of this court ordinarily remains the

law of the case unless it is in conflict with a subsequent decision by this court sitting en banc or by the Supreme Court." (citations omitted)).

Law of the case does not limit a court's power to revisit its prior decisions but "merely expresses the practice of courts generally to refuse to reopen what has been decided." *Christianson*, 486 U.S. at 817 (quoting *Messinger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.)). Exceptional circumstances that warrant departure from the law of the case include "the discovery of new and different material evidence that was not presented in the prior action,[2] or an intervening change of controlling legal authority, or when the prior decision is clearly incorrect and its preservation would work a manifest injustice." *Integraph Corp. v. Intel Corp.*, 253 F.3d 695, 698 (Fed. Cir. 2001) (citing *Smith Int'l, Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1576 (Fed. Cir. 1985)).

The claim construction of the panel that heard [redacted]'s appeal from the PTAB is not law of the case in [redacted]'s pending appeal from the district court because the proceedings of the district court and those of the PTAB are not the same case. *See Christianson*, 486 U.S. at 815–16 (stating that law of the case governs "the same issues in subsequent stages *in the same case*" (emphasis added) (quoting *Arizona*, 460 U.S. at 618)). Fundamentally, an IPR is an administrative proceeding, whereas a district court proceeding is a civil action for patent infringement. *See* 35 U.S.C. § 311 ("[A] person who is not the owner of a patent may file *with the Office* a petition to institute [IPR] of the patent." (emphasis added)); *id.* § 315(a)(1) (referring to civil actions as "other proceedings or actions"); *id.* § 315(a)(2) (instructing a district court automatically to stay a civil action if the civil action is filed after the IPR petition); *see also* 28 U.S.C. § 1295(a)(1), (a)(4)(A) (describing the jurisdiction of the Federal Circuit and distinguishing appeals from civil actions and PTAB proceedings). Thus, the panel that will hear [redacted]'s pending appeal from the district court will not be bound through law of the case by the claim construction of the panel that heard [redacted]'s appeal from the PTAB because the two appeals are not from the same case.

In sum, neither stare decisis nor law of the case likely will bind the Federal Circuit panel that will hear [redacted]'s pending appeal from the district court to the claim construction of the Federal Circuit panel that heard [redacted]'s appeal from the PTAB.

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[2] Occasionally, courts have treated PTAB proceedings, and decisions therefrom, not as decisions that establish the law of the case but as new evidence that may warrant departure from the law of the case. *See Snyders Heart Valve LLC v. St. Jude Med.*, No. 18-2030, 2020 WL 1445835, at *3–4 (D. Minn. Mar. 25, 2020) (considering a PTAB decision to be new evidence that justified departure from the claim construction already conducted by the transferor court, the U.S. District Court for the Eastern District of Texas).

C. Effect of the PTAB's Claim Construction on the District Court's Claim Construction

A district court is not bound by the PTAB's claim construction. Aside from this principle, appellate courts have provided little guidance on how a district court should treat the PTAB's claim construction. Judicial practice suggests that a district court may consider the PTAB's claim construction in formulating its own. The effect of the PTAB's claim construction on the parallel district court litigation, therefore, is subject to the district court's discretion.

Courts have consistently held that district courts are not bound by the decisions, including claim constructions, of the PTAB. For example, in *In re Baxter International, Inc.*, the Federal Circuit summarized the primacy of courts over the PTO:

> Thus, because the two proceedings necessarily applied different burdens of proof and relied on different records, the PTO did not err in failing to provide [a] detailed explanation . . . as to why the PTO came to a different determination than the court system in the [related] litigation.
>
> Lest it be feared that we are erroneously elevating a decision by the PTO over a decision by a federal district court, which decision has been affirmed by this court, the following additional comments must be made.
>
> . . . [T]his case is not about the relative primacy of the courts and the PTO, about which there can be no dispute.

678 F.3d 1357, 1365 (Fed. Cir. 2012). Further, some district courts have held that they owe no deference to the PTAB's claim construction. *See, e.g.*, *Pragmatus AV, LLC v. Yahoo! Inc.*, No. C-13-1176, 2014 WL 1922081, at *4 (N.D. Cal. May 13, 2014) ("The problem for Yahoo is that this Court owes no deference to the PTAB's claim construction done as part of an inter partes review." (citing *Rensselaer Polytechnic Inst. v. Apple Inc.*, No. 1:13-CV-0633, 2014 WL 201965, at *9 (N.D.N.Y. Jan. 15, 2014))). Other district courts have gone further by asserting that, in an IPR, the PTAB does not even engage in claim construction but merely renders non-binding, administrative decisions. *See Rensselaer*, 2014 WL 201965, at *9 ("The focus of the PTAB in such a proceeding is upon validity; even if an IPR is conducted, *that administrative body will not engage in claim construction*. In making its determination, the PTAB is mandated to accord claim terms their broadest possible construction." (emphasis added) (citing 37 C.F.R. § 42.100(b))).

Analogously, the PTAB is not bound by a district court's claim construction. *See, e.g.*, *Power Integrations, Inc. v. Lee*, 797 F.3d 1318, 1326 (Fed. Cir. 2015) ("There is no dispute that the board is not generally bound by a prior judicial construction of a claim term." (citing *In re Trans Tex. Holdings Corp.*, 498 F.3d 1290, 1298 (Fed. Cir. 2007))); *see Cirrus Logic, Inc. v. Knowles Elecs. LLC*, No. 2015-004342, 2015 WL 5272691, at *12 (P.T.A.B. Sept. 8, 2015)

("[P]recedent makes clear that the USPTO is not bound in reexamination proceedings by claim constructions produced by a court." (citing *In re Trans Tex. Holdings Corp.*, 498 F.3d 1290, 1298 (Fed. Cir. 2007))), *aff'd*, 883 F.3d 1358 (Fed. Cir. 2018). Indeed, the PTO and district courts are fundamentally different fora with different legal standards and purposes; as a result, neither can bind the other. *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2143–44 (2016) (rejecting petitioner's argument that IPRs are "surrogate[s] for court proceedings" because the different standards "indicate that the purpose of the proceeding is not quite the same as the purpose of the district court litigation").

Aside from neither the PTAB nor the district courts binding the other, "there is little guidance . . . on exactly how district courts should treat PTAB claim construction decisions when construing claims during litigation[]." Nick R. Bagley, *Treatment of PTAB Claim Construction Decisions: Aspiring to Consistency and Predictability*, 32 BERKELEY TECH. L.J. 315, 315 (2017) (citations omitted). Judicial practice suggests that a district court may consider the PTAB's claim construction and may even adopt it if, in the district court's judgment, the PTAB's claim construction is correct. *See, e.g.*, *Scripps Research Int. v. Illumina, Inc.*, No. 16-CV-661, 2018 WL 1726597, at *6 (S.D. Cal. Apr. 10, 2018) ("The Court agrees with the PTAB's construction. The decision is reasoned, persuasive, and provides the Court with guidance on the construction of the term."); *Rensselaer*, 2014 WL 201965, at *9 ("[If] . . . the PTAB, in any final decision, provides insights into claim construction, the court may take them into account . . . ."). And, analogously, the Federal Circuit has approved of the PTAB's consideration of a district court's claim construction. *See Power Integrations*, 797 F.3d at 1326 (suggesting that the PTAB has an obligation "to acknowledge th[e] [district court's] interpretation [and] to assess whether it is consistent with the broadest reasonable construction of the term"); *Google Inc. v. SimpleAir, Inc.*, 682 F. App'x 900, 903 (Fed. Cir. 2017) (noting that the PTAB adopted the district court's claim construction).

In sum, a district court is not bound by the PTAB's claim construction. Aside from this principle, appellate courts have provided little guidance on how a district court should treat the PTAB's claim construction. Judicial practice suggests that a district court may consider the PTAB's claim construction in formulating its own. The effect of the PTAB's claim construction on the parallel district court litigation, therefore, is subject to the district court's discretion.

V. Conclusion

A patent challenger is not required to raise the issue of prosecution disclaimer on appeal from an IPR in order for prosecution disclaimer to apply in subsequent district court litigation. Because neither common law waiver nor collateral estoppel imposes such a requirement on the patent challenger, [redacted] properly raised its prosecution disclaimer argument before the district court.

A Federal Circuit panel that hears an appeal from a civil action likely is not bound by the claim construction of a prior Federal Circuit panel that heard an appeal from a parallel inter partes review proceeding, if both appeals involve the same patents but use different claim

construction standards. Because neither stare decisis nor law of the case likely produces such a binding effect in this circumstance, the Federal Circuit panel that will hear [redacted]'s pending appeal from the district court likely will not be bound by the claim construction of the Federal Circuit panel that heard [redacted]'s appeal from the PTAB.

The effect of the PTAB's claim construction on a district court is subject to the district court's discretion. A district court is not bound by the PTAB's claim construction. Aside from this principle, appellate courts have provided little guidance on how a district court should treat the PTAB's claim construction. But judicial practice suggests that a district court may consider the PTAB's claim construction in formulating its own. The effect of the PTAB's claim construction on the parallel district court litigation, therefore, is subject to the district court's discretion.

Applicant Details

First Name	**Nathan**
Middle Initial	**J**
Last Name	**Moelker**
Citizenship Status	**Lawful permanent residents who are seeking citizenship as outlined in 8 U.S.C. Â§ 1324b(a)(3)(B)**
Email Address	**nathmoe@mail.regent.edu**
Address	**Address** Street **305 Summit Court, Hampton, VA, USA** City **Hampton** State/Territory **Virginia** Zip **23666** Country **United States**
Contact Phone Number	**7249878477**

Applicant Education

BA/BS From	**Geneva College**
Date of BA/BS	**May 2019**
JD/LLB From	**Regent University School of Law** **http://www.regent.edu/acad/schlaw/**
Date of JD/LLB	**May 9, 2022**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Journal of Free Speech Law** **Journal of Global Justice and Public Policy**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Thurgood Marshall Memorial Federal Bar Association National Moot Court Competition**

Notre Dame Religious Liberty Moot Court Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Martin, Mark
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References

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(Supervisor at Virginians For Reconciliation and Supervisor for a Book Research Project)

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nathan J. Moelker
305 Summit Court
Hampton, VA 23666
(724) 987-8477, nathmoe@mail.regent.edu

June 14, 2021

United States District Court for the Eastern District of Virginia
701 East Broad Street, Suite 6112
Richmond, Virginia
23219-3528

Dear Judge Hanes,

I am a rising third-year law student at Regent University, where I am ranked 1st out of 96 with a grade point average of 4.05. I am applying for your 2022-24 clerkship position. I hope to start my career with learning from you through a clerkship in your chambers. Such a clerkship would be an incredible opportunity to grow in my understanding of legal processes through witnessing careful adjudication.

I am an immigrant to the United States, born in Canada and raised in New Zealand. I am deeply thankful for the protections offered by our system of ordered liberties. That background sparks my passion for the law and liberty and my desire to serve in the American court system.

I am eager to seek to assist you and the work of your court. This summer I am serving as a Judicial Intern for Justice Stephen McCullough, of the Virginia Supreme Court, where I assist both with the court's writ panel and with their merits cases, providing summary memorandums of cases and issues. I spent last summer interning for Regent University's Center for Constitutional Law. Among other things, I helped to research and write amicus briefs on constitutional issues, including two U.S. Supreme Court cases. I also currently intern for the American Center for Law and Justice, where I research and write on international and constitutional law. I also serve as the Managing Editor of the Journal for Global Justice and Public Policy, a law review focused on human rights and policy matters.

A clerkship with you would be an incredible honor and a wonderful opportunity to grow by working closely with you and witnessing careful judicial determination at the highest level. I am eager to apply the tools I have received through seeking to help you in the administration of justice. I hope to practice law here in Virginia, and this opportunity would be an incredibly exciting opportunity to grow in my understanding of the application of federal law here in Virginia.

Thank you for your review of my application and my enclosed resume. I may be reached at (724) 987-8477, and I look forward to hearing from you.

Sincerely,

Nathan Jeremiah Moelker

Nathan J. Moelker

305 Summit Court, Hampton, VA 23666
(724) 987-8477, nathmoe@mail.regent.edu

EDUCATION:

Regent University School of Law, Virginia Beach, VA **Expected May 2022**
Candidate for Juris Doctor, Honors Program

G.P.A: 4.053 Rank: 1/96
Honors: Regent Scholar Award Full Merit Scholarship, Second Place in the Thurgood Marshall Memorial Federal Bar Association National Moot Court Competition, Ronald L. Fick Book Award in Civil Procedure II, Torts I & II, Property I & II, State Constitutional Law, Professional Responsibility, Evidence, Criminal Law, and Constitutional Law II.
Activities: Managing Editor of the Journal for Global Justice & Public Policy, Moot Court Board, Honor Council.

Geneva College, Beaver Falls, PA **May 2019**
Bachelor of Arts in English Literature and Bachelor of Science in Computer Science, Minors in Philosophy and Humanities; Summa cum Laude; G.P.A: 3.98

Honors: Pro Christo et Patria Merit Academic Scholarship, Dean's List, Sigma Tau Delta, Byron I. Bitar Memorial Annual Cash Prize for Best Philosophy Paper, Church History Prize, Patterson Award for Best Political Philosophy Paper, Honors Thesis.
Activities: English Club President, Student Activities Leader, Theatre Student Director, Honors Program Student Council, Teaching Assistant, Library Student Staff, Writing Tutor.

LEGAL EXPERIENCE:

Justice Stephen McCullough, Supreme Court of Virginia, Fredericksburg, VA **May-September 2021**
Summer Judicial Intern
Research and write summarization memorandums for a writ panel. Research and prepare bench briefs and memorandums for determinations of issues on the merits. Assist in the editing and preparation of a variety of legal documents. Assist in the research and preparation of the state model jury instructions.

Regent University's Center for Global Justice, Virginia Beach, VA **January-May 2021**
Law Student Staff Member
Researched and wrote for a variety of international human rights projects, including helping to research and write an amicus brief in the U.S. Supreme Court case *Nestlé v. Doe,* concerning child slavery.

Regent University's Robertson Center for Constitutional Law, Virginia Beach, VA **Summer 2020-present**
Law Fellow
Research constitutional law projects, assist with preparing an amicus brief for the U.S. Supreme Court in *Fulton v. Philadelphia,* assist with the writing of circuit court amicus briefs, and aiding Chief Justice Mark Martin in various administrative tasks.

The American Center for Law and Justice, Virginia Beach, VA **August 2020-present**
Law Clerk
Research international law, religious liberty, and constitutional law matters. Assist with both urgent short-term research memorandums and the writing of long-term research memorandums.

Governor Robert McDonnell, Virginia Beach, VA **April-September 2020**
Research and Administrative Intern
Researched legal issues pertaining for a variety of legal issues relating to nonprofit governance and criminal law reform. Provided legal analysis of a variety of urgent issues. Assisted with the operation of a nonprofit organization.

INTERESTS:

Poetry and Literature, Medieval and Colonial History, Philosophical and Theological Discussion.

REGENT UNIVERSITY Genisys

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Display Transcript

B07018310 Nathan J. Moelker
Jun 05, 2021 02:42 pm

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Institution Credit Transcript Totals Courses in Progress

Transcript Data

STUDENT INFORMATION

Curriculum Information

Current Program
Juris Doctor
Program: J.D. - Juris Doctor
Campus: Virginia Beach Campus
Major and Department: Law, LAW|JD Law

***Transcript type:WEB is NOT Official ***

INSTITUTION CREDIT -Top-

Term: Fall 2019

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	511	LA	Foundations of Law	A	2.000	8.00		
LAW	521	LA	Contracts I	A	3.000	12.00		
LAW	541	LA	Torts I	A+	2.000	8.00		
LAW	551	LA	Civil Procedure I	A	2.000	8.00		
LAW	552	LA	Legal Analysis, Rsrch&Wrtng I	B+	3.000	9.99		
LAW	561	LA	Property I	A+	3.000	12.00		

Term Totals (First Professional Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	57.99	3.86
Cumulative:	15.000	15.000	15.000	15.000	57.99	3.86

Unofficial Transcript

Term: Spring 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End	R

							Dates
LAW	512	LA	Foundations of Practice	P	1.000	0.00	
LAW	522	LA	Contracts II	A	2.000	8.00	
LAW	542	LA	Torts II	A+	3.000	12.99	
LAW	553	LA	Legal Analysis, Rsrch&Wrtng II	A	3.000	12.00	
LAW	554	LA	Civil Procedure II	A+	3.000	12.99	
LAW	562	LA	Property II	A+	3.000	12.99	

Term Totals (First Professional Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	58.97	4.21
Cumulative:	30.000	30.000	30.000	29.000	116.96	4.03

Unofficial Transcript

Term: Summer 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	703	LA	Non-Prof, Tax-Exempt Orgnzatns	A	3.000	12.00		

Term Totals (First Professional Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	3.000	3.000	3.000	3.000	12.00	4.00
Cumulative:	33.000	33.000	33.000	32.000	128.96	4.03

Unofficial Transcript

Term: Fall 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	575	LA	SpTp: State Constitutional Law	A	2.000	8.00		
LAW	650	LA	Appellate Advocacy	A-	3.000	11.01		
LAW	652	LA	Evidence	A+	4.000	17.32		
LAW	683	LA	Con Law I/ConstitutionalStruct	A	3.000	12.00		
LAW	691	LA	Professional Responsibility	A+	3.000	12.99		
LAW	748	LA	Academic Legal Scholarship	A	2.000	8.00		

Term Totals (First Professional Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	17.000	17.000	17.000	17.000	69.32	4.07
Cumulative:	50.000	50.000	50.000	49.000	198.28	4.04

Unofficial Transcript

Term: Spring 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	531	LA	Criminal Law	A+	3.000	12.99		
LAW	575	LA	SpTp: Jurisprudence Seminar	P	1.000	0.00		
LAW	575	LA	SpTp: Con Frmwk of Relig Libty	P	1.000	0.00		
LAW	684	LA	ConstitutionalLawII/Ind.Rights	A+	3.000	12.99		
LAW	751	LA	Federal Courts	A	3.000	12.00		
LAW	778	LA	Advanced Appellate Advocacy 1	A-	3.000	11.01		

LAW	780P1	LA	Professional SkillsPracticum I	P	2.000	0.00

Term Totals (First Professional Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	12.000	48.99	4.08
Cumulative:	66.000	66.000	66.000	61.000	247.27	4.05

Unofficial Transcript

TRANSCRIPT TOTALS (FIRST PROFESSIONAL LAW) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	66.000	66.000	66.000	61.000	247.27	4.05
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	66.000	66.000	66.000	61.000	247.27	4.05

Unofficial Transcript

COURSES IN PROGRESS -Top-

Term: Fall 2021

Subject	Course	Level	Title	Credit Hours	Start and End Dates
LAW	563	LA	Intellectual Property	3.000	
LAW	602	LA	Business Associations	3.000	
LAW	621	LA	UCC I	2.000	
LAW	774	LA	First Amendment Law	3.000	
LAW	784	LA	International Law	3.000	
LAW	883	LA	International & Comparative Human Rights	3.000	

Unofficial Transcript

RELEASE: 8.7.1

Alumni and Friends

My Unofficial Transcript

Unofficial Transcript for: Nathan Jeremiah Moelker

Division: Undergraduate

Type	Attempted Credits	Earned Credits	GPA Credits	Quality Points	GPA
Transfer	0.00	0.00	0.00	0.00	0.00
Local	157.00	157.00	155.00	610.00	3.93
Career	157.00	157.00	155.00	610.00	3.93

2018-2019 - Spring Term

Course	Title	Grade	Repeat	Attempted Credits	Earned Credits	GPA Credits	Quality Points	GPA
CSC 251 31	NETWORKS AND SECURITY	A+	-	4.00	4.00	4.00	16.00	
CSC 484 E1	SENIOR SOFTWARE PROJECT	A-	-	3.00	3.00	3.00	11.10	
HUM 304 37	CHURCH HISTORY II:REFORMATN&MODERN	A+	-	3.00	3.00	3.00	12.00	
HUM 491 31	HUMANITIES CAPSTONE	A	-	1.00	1.00	1.00	4.00	
PHI 113 31	C.S. LEWIS	A+	-	3.00	3.00	3.00	12.00	
PHI 206 31	AQUINAS AND MEDIEVAL PHILOSOPHY	A+	-	3.00	3.00	3.00	12.00	
PHI 355 31	PHILOSOPHY FOR THEOLOGY	A	-	3.00	3.00	3.00	12.00	
			Term Totals:	**20.00**	**20.00**	**20.00**	**79.10**	**3.95**
			Career Totals:	**157.00**	**157.00**	**155.00**	**610.00**	**3.93**

2018-2019 - Fall Term

Course	Title	Grade	Repeat	Attempted Credits	Earned Credits	GPA Credits	Quality Points	GPA
CSC 311 IS1	CYBERETHICS AND CYBER LAW	A+	-	2.00	2.00	2.00	8.00	
CSC 483 E1	SENIOR SOFTWARE PROJECT	B	-	3.00	3.00	3.00	9.00	

ENG 213 E1	NON-W FILM	A+	-	3.00	3.00	3.00	12.00	
ENG 489 01	MAJORS SEMINAR	A	-	3.00	3.00	3.00	12.00	
PHI 110 01	THE PHILOSOPHICAL CONVERSATION	A	-	3.00	3.00	3.00	12.00	
PHI 309 01	KIERKEGAARD AND NIETZSCHE	A	-	3.00	3.00	3.00	12.00	
POL 352 01	GREAT ISSUES IN POLITICS	A	-	3.00	3.00	3.00	12.00	
			Term Totals:	**20.00**	**20.00**	**20.00**	**77.00**	**3.85**
			Career Totals:	**137.00**	**137.00**	**135.00**	**530.90**	**3.93**

2017-2018 - Spring Term

Course	Title	Grade	Repeat	Attempted Credits	Earned Credits	GPA Credits	Quality Points	GPA
CSC 101 32	INTRODUCTION TO PROGRAMMING	A+	-	3.00	3.00	3.00	12.00	
CSC 204 31	ALGORITHMS	A+	-	3.00	3.00	3.00	12.00	
ENG 282 31	AMERICAN LIT FROM CIVIL WAR TO PRES	A	-	3.00	3.00	3.00	12.00	
ENG 291 31	MASTERPIECES OF WORLD LITERATURE	A	-	3.00	3.00	3.00	12.00	
ENG 495 H1	TOLKEIN'S METANARRATIVE AS A DISTIL	A+	-	2.00	2.00	2.00	8.00	
HUM 303 E1	PERSPECTIVES:FAITH,CULTURE,IDENTITY	A	-	3.00	3.00	3.00	12.00	
MAT 130 31	DISCRETE MATH	B+	-	3.00	3.00	3.00	9.90	
			Term Totals:	**20.00**	**20.00**	**20.00**	**77.90**	**3.89**
			Career Totals:	**117.00**	**117.00**	**115.00**	**453.90**	**3.94**

2017-2018 - Fall Term

Course	Title	Grade	Repeat	Attempted Credits	Earned Credits	GPA Credits	Quality Points	GPA
CHM 111 0B	GENERAL COLLEGE CHEMISTRY	B+	-	4.00	4.00	4.00	13.20	
CSC 363 E1	DATABASE SYSTEMS	A	-	3.00	3.00	3.00	12.00	
ENG 232 01	INTRODUCTION TO RHETORIC	A	-	3.00	3.00	3.00	12.00	

ENG 281 01	AMERICAN LITERATURE TO CIVIL WAR	A	-	3.00	3.00	3.00	12.00	
ENG 390 01	SCI FICTION	A	-	3.00	3.00	3.00	12.00	
PED 101 01	FITNESS TRAINING	A+	-	1.00	1.00	1.00	4.00	
PHI 202 01	AUGUSTINE	A	-	3.00	3.00	3.00	12.00	
			Term Totals:	**20.00**	**20.00**	**20.00**	**77.20**	**3.86**
			Career Totals:	**97.00**	**97.00**	**95.00**	**376.00**	**3.95**

2016-2017 - Spring Term

Course	Title	Grade	Repeat	Attempted Credits	Earned Credits	GPA Credits	Quality Points	GPA
COM 201 31	THEATRE PRACTICUM	CR	-	1.00	1.00	0.00	0.00	
CSC 102 31	OBJECT-ORIENTED PROGRAMMING	A	-	3.00	3.00	3.00	12.00	
CSC 203 31	SOFTWARE ENGINEERING	A	-	3.00	3.00	3.00	12.00	
ENG 223 31	LITERARY MAGAZINE	CR	-	1.00	1.00	0.00	0.00	
ENG 262 31	BRITISH LITERATURE FR 18THC TO PRES	A	-	3.00	3.00	3.00	12.00	
ENG 390 31	DOSTOYEVSKY	A	-	3.00	3.00	3.00	12.00	
HON 300 H1	ACADEMIC FAITHFULNESS	A	-	3.00	3.00	3.00	12.00	
HUM 203 36	MAKING THE WEST	A	-	3.00	3.00	3.00	12.00	
			Term Totals:	**20.00**	**20.00**	**18.00**	**72.00**	**4.00**
			Career Totals:	**77.00**	**77.00**	**75.00**	**298.80**	**3.98**

2016-2017 - Fall Term

Course	Title	Grade	Repeat	Attempted Credits	Earned Credits	GPA Credits	Quality Points	GPA
CSC 133 0A	SURVEY OF COMPUTER SCIENCE	A	-	4.00	4.00	4.00	16.00	
ENG 112 01	INTRO LITERARY STU&RESEARCH	A	-	3.00	3.00	3.00	12.00	
ENG 261 01	BRITISH LITERATURE TO 18TH C	A	-	3.00	3.00	3.00	12.00	

ENG 351 01	SHAKESPEARE	A	-	3.00	3.00	3.00	12.00	
ENG 382 01	ENGLISH GRAMMARS	A	-	3.00	3.00	3.00	12.00	
HIS 252 01	US III: 20TH CENTURY	A	-	3.00	3.00	3.00	12.00	
HON 201 H1	THEME OF CALLING HONORS	A	-	1.00	1.00	1.00	4.00	
			Term Totals:	**20.00**	**20.00**	**20.00**	**80.00**	**4.00**
			Career Totals:	**57.00**	**57.00**	**57.00**	**226.80**	**3.97**

2015-2016 - Spring Term

Course	Title	Grade	Repeat	Attempted Credits	Earned Credits	GPA Credits	Quality Points	GPA
BIB 152 H1	INT TO BIBLICAL STUDIES NT - HONORS	A	-	3.00	3.00	3.00	12.00	
ENG 201 31	INTRODUCTION TO CREATIVE WRITING	A	-	3.00	3.00	3.00	12.00	
ENG 212 E1	CINEMA	A	-	3.00	3.00	3.00	12.00	
HON 102 H1	FRESHMAN HONORS: COLLEGE	A-	-	1.00	1.00	1.00	3.70	
HON 120 H1	SOCIETY	A+	-	3.00	3.00	3.00	12.00	
MAT 105 31	ELEMENTARY STATISTICAL METHODS	A	-	3.00	3.00	3.00	12.00	
SCS 110 0A	INTRO NATURAL SCIENCE	A	-	4.00	4.00	4.00	16.00	
			Term Totals:	**20.00**	**20.00**	**20.00**	**79.70**	**3.98**
			Career Totals:	**37.00**	**37.00**	**37.00**	**146.80**	**3.96**

2015-2016 - Fall Term

Course	Title	Grade	Repeat	Attempted Credits	Earned Credits	GPA Credits	Quality Points	GPA
BIB 151 H1	INT TO BIBLICAL OT STUDIES - HONORS	A	-	3.00	3.00	3.00	12.00	
COM 101 07	PRINCIPLES OF COMMUNICATION	A-	-	3.00	3.00	3.00	11.10	
COM 165 01	ACTING PRINCIPLES	A	-	3.00	3.00	3.00	12.00	
ENG 151 H1	HONORS ENGLISH COMPOSITION	A+	-	3.00	3.00	3.00	12.00	

HON 101 H1	FRESHMAN HONORS: COLLEGE	A	-	1.00	1.00	1.00	4.00	
HUM 103 H2	INVITATION TO THE HUMANTIES	A	-	3.00	3.00	3.00	12.00	
PED 103 05	PHYSICAL FITNESS	A	-	1.00	1.00	1.00	4.00	
			Term Totals:	**17.00**	**17.00**	**17.00**	**67.10**	**3.94**
			Career Totals:	**17.00**	**17.00**	**17.00**	**67.10**	**3.94**

Printable Unofficial Transcript

June 09, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Re: Application of Nathan Moelker

I am pleased to recommend Nathan Moelker to serve as a law clerk in your chambers. With outstanding academic credentials, excellent writing skills, and absolute integrity, Nathan is well suited to serve as a law clerk.

Nathan has been a truly exceptional student in his time at Regent Law. His record speaks for itself. He ranks first in his class. Through only three semesters, Nathan received the Ronald L. Fick Book Award for achieving the highest grade in eight of his courses, including State Constitutional Law, which he took with U.S. Circuit Judge Jeffrey Sutton and Professor Brad Lingo. Based on his stellar record of academic achievement, I selected Nathan as one of eighteen students to participate in a special seminar I co-taught earlier this semester with United States Supreme Court Justice Samuel A. Alito Jr. Nathan performed with excellence in every respect.

Notably, Nathan received high quality training in multiple internships. For instance, over the last year and a half, Nathan has provided research and writing assistance to the Center for Global Justice. Last fall, he assisted the Center for Global Justice with an amicus brief to the United States Supreme Court signed by Executive Director Jeff Brauch and former U.S. Solicitor General Ken Starr. Since last summer, Nathan has worked with the Robertson Center for Constitutional Law to assist in preparing two amicus briefs, including a brief to the United States Supreme Court that I signed as counsel of record. Nathan has been a genuine asset in these projects. And I am confident that the mentoring and experience he received in these and other internships has further refined his ability to excel as a law clerk.

In addition to his academic success and experience, Nathan has demonstrated a genuine commitment to the Regent Law community. He serves as Managing Editor for the Regent University Journal for Global Justice & Public Policy. He serves on the Honor Council and the Moot Court Board. And this spring, Nathan's moot court team placed second at the Thurgood Marshall Moot Court Competition held by the Federal Bar Association.

Perhaps most importantly, though, Nathan is a person of the highest integrity. Nathan is a person who, in my view, would maintain confidential chambers information with wise discretion and total integrity.

I am honored to recommend Nathan for your consideration without reservation. I am confident that he will be an excellent law clerk. Please feel free to contact me if I can answer any further questions about Nathan, or if I can otherwise be of assistance to you in any way.

Sincerely,

Mark Martin
Dean and Professor of Law
Regent University School of Law

June 07, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am pleased to recommend Nathan Moelker to serve as your law clerk. I recommend Nathan highly and enthusiastically.

I have known Nathan since August 2019. He was in my Honors Property I and II courses. Nathan is bright, mature, and conscientious. His insights go deep beneath the surface, and he challenges his colleagues to a high level of mastery. Nathan won the book award both semesters, each time earning a score that was the highest in the class by a significant margin, which was particularly noteworthy in an Honors section.

Nathan's legal analysis is exceptional, and he is a very good writer who has worked diligently to develop his advocacy skills. As the faculty advisor to our Moot Court Board, I selected Nathan to compete at the 2021 Thurgood Marshall Memorial Moot Court Competition sponsored by the Federal Bar Association. He and his partner finished second (to a team from UCLA that included two 3Ls who will be clerking for Ninth Circuit judges) out of 40 teams. Nathan's contributions to this stellar performance were considerable.

Nathan has the ability to excel as a judicial clerk. He is cooperative and respectful and thus would be an asset to your office. Because I am confident that Nathan would serve you well, I encourage you to extend an offer to him.

Please do not hesitate to contact me at michher@regent.edu or (757) 352-4724 if I can provide additional information or assistance.

Michael Hernandez

Professor and former Dean

Nathan J. Moelker
305 Summit Court
Hampton, VA 23666
(724) 987-8477, nathmoe@mail.regent.edu

Writing Sample for Nathan J. Moelker

The following writing sample was taken from my Advanced Appellate Advocacy course, in which I received an A Minus. The brief was also submitted in the Thurgood Marshall Memorial Federal Bar Association National Moot Court Competition, in which I also competed as an oral advocate. We came in second in that competition, competing in the final round and defeating a number of universities. Our brief was commended for its high quality, receiving a score of 93 percent, with no grammatical or bluebooking penalties. We drafted a Supreme Court brief, concerning the constitutionality of a defendant's conviction. I was tasked with writing on behalf on behalf of the defendant, arguing that his constitutional right to present a defense was violated by the exclusion of another's confession to the murder. I particularly enjoyed this problem because it provided an opportunity to analyze and defend critical constitutional questions regarding fundamental rights and liberties. Due to interests of space, I have only included in this sample a portion of my argument section. I would be more than happy to provide more of the brief if it would be helpful. In the portion after this excerpted section, I argue that this excluded confession was material and the error was not a harmless error, drawing on policy considerations and *United States v. Scheffer*, 523 U.S. 303 (1998).

Nathan Moelker
Writing Sample

I. The exclusion of Leopold Lara's confession violated Kenny Bearson's constitutional right to present a complete defense by arbitrarily and disproportionately excluding material evidence central to his claim of innocence.

The Constitution guarantees to the accused the opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Although lawmakers have some constitutional latitude to establish rules of evidence, *United States v. Scheffer*, 523 U.S. 303, 308 (1998), that latitude may not be extended to defeat the ends of justice. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The Constitution prohibits arbitrary and disproportionate evidentiary exclusions that infringe on the weighty interests of the accused. *Holmes v. South Carolina*, 547 U.S. 319, 319–20 (2006).

The trial court arbitrarily excluded evidence that was material and vital to Bearson's defense. The exclusion was arbitrary because Lara's confession was supported by strong indications of reliability and trustworthiness, like the confession in *Chambers*. The exclusion infringed on Bearson's material interests because it denied him the right to provide evidence central to his claim of innocence. If admitted, this credible confession would have had a substantial effect on the trial's outcome.

a. The exclusion of Lara's murder confession was arbitrary and disproportionate because the confession was supported by strong indications of reliability and trustworthiness.

This Court held that the exclusion of a third-party confession that had persuasive assurances of trustworthiness and satisfied the requirements for an admissible statement against interest violated the accused's constitutional right to present a defense. *Chambers*, 410 U.S. at 302. Likewise, this Court required the admission of evidence, regardless of its admissibility under state hearsay rules, when substantial reasons existed to assume its reliability. *Green v. Georgia*, 442 U.S. 95, 97 (1979).

Chambers developed several factors used to examine the trustworthiness of excluded hearsay statements. These factors include whether the statements were made spontaneously to a

close acquaintance, the statements' external corroboration, the statements' self-incriminatory nature, and the declarant's availability. *Chambers*, 410 U.S. at 300–02. Although Lara is unavailable, the other indications of reliability required by *Chambers* have all been thoroughly established, demonstrating the constitutional trustworthiness of Lara's confession.

i. Because Lara's murder confession was made spontaneously to someone in whom a confession would have been natural, the statement's trustworthiness is strongly corroborated.

Chambers held a confession to be substantiated when it was made spontaneously to a close friend shortly after the murder. 410 U.S. at 300. Likewise, *Green* considered an excluded statement reliable because the declarant confided spontaneously to a close friend. 442 U.S. at 97. In applying *Chambers* and examining the trustworthiness of out of court statements, Circuit Courts have consistently considered the statement's spontaneity and the relationship with the recipient strong indicators of credibility and reliability. *United States v. Lozado*, 776 F.3d 1119, 1133 (10th Cir. 2015); *United States v. Monserrate-Valentin*, 729 F.3d 31, 53 (1st Cir. 2013); *United States v. Thomas*, 571 F.2d 285, 290 (5th Cir. 1978).

Lara was crying and intoxicated when he confessed to the murder. He "blurted out" his confession. Like the declarant in *Chambers*, he made his confession spontaneously, without any external prompting or request. Lara confessed after an unrelated chase for a traffic incident, rather than initiating his confession as a testimonial informant. Although this arrest occurred in a custodial setting, the arresting officer was the declarant's niece. A close family member is someone to whom admission to a crime would be natural and expected. *United States v. Poland*, 659 F.2d 884, 895 (9th Cir. 1981).

The way Lara made this confession strongly indicates its reliability. Rather than being instigated by the police, the confession was spontaneous, unprovoked, and unprompted. Because Lara spontaneously confessed to a trusted relative, the reliability of his confession is established under *Chambers*.

ii. Lara's murder confession was a self-incriminatory statement against interest with no motive to misrepresent or lie on Bearson's behalf.

Lara's confession was unquestionably an incriminatory statement against interest. Due to his lack of connection to Bearson, Lara had no motive to lie or misconstrue the facts for Bearson's benefit. *Chambers* emphasized that the excluded confession was reliable because the declarant would gain no benefit from admitting his role in the crime. 410 U.S. at 301. As Justice Holmes wrote, a confession should be considered trustworthy if "there [is] no ground for connecting" the declarant with the defendant. *Donnelly v. United States,* 228 U.S. 243, 277 (1913) (Holmes, J., dissenting). *Green* likewise considered certain hearsay admissible because it was made against interest and the declarant lacked an ulterior motive to lie on behalf of the accused. 442 U.S. at 97.

Applying this requirement, the Second Circuit excluded a hearsay statement because the declarant knew the defendant and had a motive to lie on the defendant's behalf. *United States v. Salvador,* 820 F.2d 558, 562 (2d Cir. 1987). Likewise, applying *Chambers,* the Seventh Circuit admitted hearsay as a statement against interest because the declarant did not know the defendant or have any ulterior reason to take the blame. *United States v. Hatfield,* 591 F.3d 945 (7th Cir. 2010).

There is no significant relationship between Lara and Bearson reflected in the record. Like the declarant in *Hatfield,* Lara had no reason to lie for Bearson. Rather than admitting to a crime for a conspirator's benefit as in *Salvador,* Lara gained no advantage by confessing to the crime. Although Lara asked how Bearson was doing, there is no evidence to indicate they were conspirators. Like the declarant in *Chambers,* who gained no reward by admitting to the crime. 410 U.S. at 301, Lara had nothing to gain by taking the blame for the murders.

"No other statement is so much against interest as a confession of murder." *Donnelly,* 228 U.S. at 278 (Holmes, J., dissenting). Lara's murder confession was clearly against his

interest, as he confessed to a double homicide. He was already facing penalties for intoxicated driving and speeding. He had no reason to think that police, especially an officer who was a close family member, would attempt to frame him for murders he did not commit. The only motivation that could exist for this confession was telling the truth.

In short, Lara's confession to the murders has the required indicators of trustworthiness and reliability. The confession inculpated Lara for the murder, and he had no reason to accept criminal liability on Bearson's behalf. The confession falls under the rationale for statements against interest and is reliable under the factors laid out in *Chambers*.

iii. Lara's murder confession was sufficiently corroborated both by the facts communicated in the confession and by external testimony.

Lara's confession is corroborated by his knowledge of facts only someone involved in the crime could know. *Chambers* emphasized that the confession was admissible because it was corroborated by other evidence. 410 U.S. at 300. To determine when evidence is externally corroborated, courts examine if the declarant demonstrates personal knowledge of the crime, *Poland*, 659 F.2d at 895, if the declarant was present at the crime scene and accurately reported it, *Hatfield*, 591 F.3d at 953, and if independent agents substantiated the declarant's statements, *United States v. Paguio*, 114 F.3d 928, 933 (9th Cir. 1997).

Lara's confession demonstrated knowledge of facts only someone involved in the murder could possess. Most notably, he confessed to using a .30 caliber rifle in the murder. The caliber of the murder weapon would not be knowledge an ordinary person would possess and blurt out unprovoked. Further, Lara's statement that he did not intend to kill the girl is corroborated by the fact that most of the bullets in her body had passed through the driver. This highly accurate statement about the manner of the woman's death could only come from someone intimately familiar with the crime scene.

Like the declarant in *Hatfield*, Lara provided testimony regarding the details of the crime that the public could not generally know. In addition to the corroboration of knowledge of the weapon's caliber and the spread of the bullets, witnesses told the police officer that Lara generally had access to similar weapons. This contrasts markedly with cases like *Lozado*, 776 F.3d 1119, where no external evidence substantiated the confession. External evidence in this case amply substantiated Lara's access to and routine possession of firearms and illegal drugs.

Lara's testimony is strongly corroborated by his possession of information regarding the caliber of rifle used in the murder and the manner of the woman's death. He could not have known this information without personal knowledge of the crime scene. It is further corroborated by external confirmation that he routinely engaged in the illegal drug trade and exchanged weapons for drugs.

b. The exclusion of Lara's murder confession infringed on a weighty interest of the accused because the evidence was central to Bearson's defense.

The constitutional right to present a complete defense requires the admission of evidence when its exclusion would significantly undermine fundamental elements of the accused's defense. *Scheffer*, 523 U.S. at 304. Fundamental elements of the defense are undermined when excluded evidence is material and favorable to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). A weighty interest of the accused is violated if the trier of fact cannot hear "all the relevant details of the charged offense from the perspective of the accused" or if the accused cannot introduce critical factual evidence. *Scheffer*, 523 U.S. at 316–17. The accused must have the opportunity to present exculpatory testimony central to a claim of innocence. *Crane*, 476 U.S. at 690–91; *Brady v. Maryland*, 373 U.S. 83, 88 (1963).

Applicant Details

First Name	**Adam**
Middle Initial	**S.**
Last Name	**Moore**
Citizenship Status	**U. S. Citizen**
Email Address	**a-moore.8@onu.edu**
Address	**Address** Street **125 1/2 E. Buckeye Ave., Apt. B** City **Ada** State/Territory **Ohio** Zip **45810** Country **United States**
Contact Phone Number	**(859) 394-5066**

Applicant Education

BA/BS From	**Northern Kentucky University**
Date of BA/BS	**May 2019**
JD/LLB From	**Ohio Northern University--Claude W. Pettit College of Law** **http://www.law.onu.edu**
Date of JD/LLB	**May 14, 2022**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**Ohio Northern University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Philip C. Jessup International Law Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

O-Melinn, Liam
l-omelinn@onu.edu
41-772-2207
Brant, Joanne
j-brant@onu.edu
419-772-2228
Kamatali, Jean-Marie
j-kamatali@onu.edu

References

Professor Karen Hall, karen.hall.dc@gmail.com, 571-216-3864
Professor Joanne Brant, j-brant@onu.edu, 419-772-2228
Professor Liam O'Melinn, l-omelinn@onu.edu, 419-772-2207
Professor Jean-Marie Kamatali, j-kamatali@onu.edu, 419-772-3920

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Adam S. Moore
125 ½ E. Buckeye Ave. Apt. B
Ada, OH 45810
(859) 394-5066 (c)
a-moore.8@onu.edu

April 11, 2022

The Honorable Elizabeth W. Hanes
U.S. District Court for the Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr. Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge:

I am writing to apply for a clerkship position with your chambers for the 2022-2023 term. I am a third-year law student and ONU Law Review Citations Editor at Ohio Northern University Pettit College of Law in Ada, Ohio.

I believe my experience and academic record will allow me to contribute well to your chambers and the work of the District Court. In terms of experience, in the summer of 2020, I was awarded a Moyer Fellowship by the Ohio State Bar Foundation, which allowed me to focus on my work for the UN office. I was able to systematically comb through dozens of atrocity incidents and track their progress through the system to better understand its functioning and make recommendations on improvement. In the summer of 2021, I was selected as an Intern with the Department of State, INL Bureau. Unfortunately, due to bureaucratic backlog, my security clearance was not processed in time, so I was not able to fully participate. Despite this, I was able to quickly pivot and secure an opportunity with the Rule of Law Collaborative, which allowed me to continue substantive work for the remainder of the summer. In this role, I once again immersed myself in varied legal issues such as strategic litigation and the labor sector in Bangladesh. Finally, my experience on Law Review, Moot Court, and other school organizations has given me exposure to numerous fields of legal study and allowed me to greatly hone my research and writing skills. It is my fervent hope that I will have the opportunity to continue to expand upon my legal research, writing, and understanding through a clerkship. I feel a clerkship will allow me to continue my passion for research and in-depth writing on a variety of legal issues, while also allowing me the opportunity to explore specific legal questions from a neutral perspective prior to becoming an advocate.

I appreciate your consideration of me as an applicant. My resume, unofficial law transcript, references, and writing sample have been included in this application. Please let me know if you would like additional information. I look forward to the opportunity to interview with you.

Respectfully,

Adam S. Moore

ADAM S. MOORE

125 ½ E. Buckeye Ave. Ada, OH 45810 | (859) 394-5066 | a-moore.8@onu.edu

EDUCATION

Ohio Northern University Pettit College of Law, Ada, OH
Juris Doctor Candidate, Anticipated Graduation: May 2022
GPA: 3.45 Rank: 12
Pursuing Certificates in International Law and Public Law & Policy.

Activities/Awards/Honors
- *ONU Law Review,* Citations Editor 2021-2022
- *ONU Law Review,* Staff Editor 2020-2021
- *Philip C. Jessup International Law Moot Court Team*, Member 2021-2022
- *International Law Society,* Executive Board President 2021-2022
- *International Law Society*, Executive Board Policy Chair 2020-2021
- *Themis Bar Review*, Student Representative
- 2020 Chief Justice Thomas J. Moyer Fellowship Grant Recipient
- Dean's List Spring 2021, Fall 2021
- CALI Book Award (highest grade), International Law, Fall 2020
- Judicial Scholarship Recipient

Northern Kentucky University, Highland Heights, KY
Bachelor of Arts, Political Science, Focus in History, May 2019

Activities/Awards/Honors
- Head Delegate and Organizer, Northern Kentucky University Model United Nations Delegation 2006-2007
- President's Honors List, Summer 2018 and Dean's List Spring 2019, Fall 2018, Spring 2018
- Northern Kentucky University Presentation/Publication Award 2007 and 2006

LEGAL EXPERIENCE

The Honorable Judge Edmund A. Sargus, Jr., U.S. District Court for the Southern District of Ohio, 2022 Spring Semester Judicial Extern.

Rule of Law Collaborative, **University of South Carolina, and Professor Karen Hall,** 2021 Summer Legal Intern (remote)
Conducted research on comparative legal systems and anti-corruption efforts, as well as drafting memorandums on evidentiary issues relating to atrocity crimes and other issues relating to rule of law promotion by national governments and NGOs.

United Nations Office on Genocide Prevention and the Responsibility to Protect, in conjunction with Professor Jean-Marie Kamatali and the ONU Center for Democratic Governance and Rule of Law, 2020 Summer Legal Research Assistant (remote)

Conducted research on early warning and the follow-up to reported atrocity crimes for an independent review of the UN and OGPRP's response. Additional research on ADR as it is conducted in civil law systems.

Rule of Law Collaborative, University of South Carolina, and Professor Karen Hall, 2020 Summer Legal Intern (remote)
Conducted research on various nations, laws, and issues as assigned, with a focus on anti-corruption and rule of law, for the purposes of informing grant proposals and NGO work.

GENERAL EXPERIENCE

Macy's Credit and Customer Service, Mason, OH, August 2016-August 2019
Supervisory role investigating fraud trends, worked with various teams to update fraud strategies, handled customer account issues, and trained department staff on updated policies and procedures.

- Escalation Lead, September 2018-August 2019
- Lead, February 2018-September 2018
- Senior Service Captain, September 2017-February 2018
- Fraud Analyst, August 2016-September 2017

***Manager,* Haven Tobacco Accessories**, Florence, KY, September 2010-July 2016
Responsible for bringing the business from conception to reality. Handled site location, licensing, lease negotiation, build-out, initial ordering and stocking, advertising, and grand opening. Handled day-to-day operations including ordering, billing, stocking, finances of business, and customer relations.

CONFERENCES AND PRESENTATIONS

- Kentucky Political Science Association Annual Meeting, Louisville, KY, March 2019. Paper presented: "To What Extent Are Costs an Obstacle to Voting Participation?"

- Midwest Political Science Association Annual Meeting, Chicago, IL.
  -April 2007. Poster presented: "The Historical Use of the Veto in the United Nations Security Council."

  -April 2006. Poster presented: "The Historical Role of the International Court of Justice and the Need for Universal Compulsory Jurisdiction."

- 5th Annual Graduate Student Symposium in Religious Studies: Religion, Politics, and Law, Florida State University, March 2006. Paper presented: "Zionism, the United States/Israeli Relation, and Their Negative Effect on the Treaty on the Non-Proliferation of Nuclear Weapons."

(/StudentSelfService/)

Adam S Moore

Academic Transcript

Transcript Level

Law

Transcript Type

World Wide Web

Student Information | Degrees Awarded | Institution Credit | Transcript Totals | Course(s) in Progress

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Name

Adam S Moore

Curriculum Information

Current Program :

College

Law

Major and Department

Law, Law

Degrees Awarded

Applied

Juris Doctor

Curriculum Information

Primary Degree

College	Major
Law	Law

Institution Credit

Term : 2019-20 Fall Semester

Academic Standing

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1001	LW	Legal Research and Writing 1	B-	3.000	8.01	
LAW	1011	LW	Civil Procedure 1	B+	3.000	9.99	
LAW	1021	LW	Contracts 1	B-	3.000	8.01	
LAW	1031	LW	Property 1	B	3.000	9.00	
LAW	1043	LW	Torts	B	4.000	12.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	47.01	2.94
Cumulative	16.000	16.000	16.000	16.000	47.01	2.94

Term : 2019-20 Spring Semester

Academic Standing

Good Standing

Term Comments

COVID-19 Disruptio n. Moved to Remote Instruction.

Optional Grades Per mitted.

P - Pass, LP - Low Pas s, NP - Not Passed

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1002	LW	Legal Research and Writing 2	A	2.000	8.00	
LAW	1004	LW	Legal Prob Solving/Analysis	B	2.000	6.00	
LAW	1012	LW	Civil Procedure 2	B+	3.000	9.99	
LAW	1022	LW	Contracts 2	B+	3.000	9.99	
LAW	1032	LW	Property 2	B+	3.000	9.99	
LAW	1052	LW	Criminal Law	B+	3.000	9.99	
LAW	1720	LW	Competitiveness & Corruption	A	3.000	12.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	19.000	19.000	19.000	19.000	65.96	3.47
Cumulative	35.000	35.000	35.000	35.000	112.97	3.23

Term : 2020-21 Fall Semester

Academic Standing

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1232	LW	Business Organizations 1	C	3.000	6.00	
LAW	1280	LW	Constitutional Law 1	B+	3.000	9.99	
LAW	1324	LW	Evidence	A	3.000	12.00	
LAW	1360	LW	International Law	A	3.000	12.00	
LAW	1364	LW	Int'l Protection-Human Rights	A-	3.000	11.01	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	15.000	51.00	3.40
Cumulative	50.000	50.000	50.000	50.000	163.97	3.28

Term : 2020-21 Spring Semester

Academic Standing
Good Standing

Additional Standing
Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1035	LW	Public Law & Legal Process	A-	3.000	11.01	
LAW	1284	LW	Constitutional Law 2	B	3.000	9.00	
LAW	1332	LW	Immigration & Nationality Law	A-	3.000	11.01	
LAW	1357	LW	International Criminal Law	A	2.000	8.00	
LAW	1388	LW	Legal Profession	A-	2.000	7.34	
LAW	1398	LW	Law Review - Staff Editor	S	2.000	0.00	
LAW	1432	LW	S/T:Specialized Legal Res	B+	1.000	3.33	I
LAW	1580	LW	Law & Literature Seminar	A	2.000	8.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	18.000	18.000	18.000	16.000	57.69	3.61
Cumulative	68.000	68.000	68.000	66.000	221.66	3.36

Term : 2021-22 Summer Semester

Academic Standing
Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1641	LW	Summer Practice Extern. I (SK)	A	3.000	12.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	3.000	3.000	3.000	3.000	12.00	4.00
Cumulative	71.000	71.000	71.000	69.000	233.66	3.39

Term : 2021-22 Fall Semester

Academic Standing

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1320	LW	Estates, Wills, and Trusts	B+	3.000	9.99	
LAW	1348	LW	Intel-Property-Unfair Comp Law	A	3.000	12.00	
LAW	1432	LW	S/T: Adv. Appellate Advocacy	A	1.000	4.00	
LAW	1432	LW	S/T: Arbitration Skills	A	3.000	12.00	I
LAW	1440	LW	Taxation:Federal Income Tax	A-	3.000	11.01	
LAW	1715	LW	Comparative Con Law	A-	3.000	11.01	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	60.01	3.75
Cumulative	87.000	87.000	87.000	85.000	293.67	3.45

Transcript Totals

Transcript Totals - (Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	87.000	87.000	87.000	85.000	293.67	3.45
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	87.000	87.000	87.000	85.00	293.67	3.45

Course(s) in Progress

Term : 2021-22 Spring Semester

Subject	Course	Level	Title	Credit Hours
LAW	1208	LW	Administrative Law	3.000
LAW	1276	LW	Conflict of Laws	3.000
LAW	1300	LW	Criminal Procedure	3.000
LAW	1328	LW	Federal Courts	3.000
LAW	1670	LW	Judicial Externship 1	2.000

April 11, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to offer an extremely enthusiastic recommendation in support of Mr. Adam Moore's application to serve as a law clerk in your chambers. Adam was in my International Law class in the fall semester of 2020, Constitutional Law in the spring semester of 2021, and Intellectual Property in the fall semester of 2021. International Law was a small class, as was Intellectual Property, and both courses called for students to take part in class discussion on a regular basis. Thus, I have had the opportunity to evaluate his abilities at close range over an extended period of time, and I believe that I am well placed to recommend him.

I am also most pleased to do so. He is truly an excellent, impressive student, and I recommend him to you without reservation. To begin, he is one of the three or four most sophisticated of the many students I have taught over the past twenty years. His breadth of learning is remarkable, and I believe that he is more knowledgeable in a greater variety of areas, in the law and in other areas as well, than any other law student I have known. Moreover, not only is his range impressive, but so is his depth of understanding. He is exceptionally intelligent and hard-working, and is always prepared for class, regardless of either the amount or difficulty of the assigned readings. He also has what I believe is the very rare ability to remember what we did weeks ago, and to relate whatever the current topic may be to subjects we discussed earlier in the term, as well as to subjects that he learned about elsewhere. This ability involves not only a good memory, but a synthetic and highly analytic approach to his intellectual pursuits. On top of this, he shows real independence of mind.

He is also a fine writer. For International Law he wrote a paper focusing on the prevention of genocide. The paper was of very high quality, demonstrating very good legal analysis and writing as well. The paper was the best I received in a class of very good students, and was the most important reason that he received the Book Award for the highest grade in the course. For Intellectual Property he wrote a paper on issues concerning patent law and private space exploration. This was likewise a fine piece of work. Once again he received the Book Award in the course.

His performance in the classroom has also been excellent, further demonstrating his combination of intelligence, diligence, and breadth of knowledge. He was very impressive in the International Law class, taking part frequently and effectively without ever seeking to dominate discussions. He was not as vocal in Constitutional Law, perhaps because it was a larger class, but when he spoke his comments were incisive, demonstrating a close familiarity with the readings and real sophistication in analyzing and discussing the issues that they raised.

In Intellectual Property he again turned in an outstanding performance. I have also come to notice on the basis of his class participation that he is unusually collegial, in a highly effective fashion. While he always addresses his classmates with respect, he is also unafraid to express his disagreement. I believe that his comments are unusually effective because whether he is expressing agreement or disagreement, he is clearly trying to be helpful to his colleagues. In this regard he has an uncommon ability to enter into his classmates' ways of thought, and any disagreement he expresses or suggestion he offers is intended to encourage improvement.

I believe that Adam Moore is extremely well-suited to perform the duties of a judicial clerk. I served as a clerk and I know that the job entails much more than the ability to do well on exams. Adam has consistently demonstrated that he has those abilities. He manages a heavy workload with aplomb, he has real independence of mind, an unusual seriousness of purpose, and excellent judgment. Further, I note that he is respectful, confident, and engaging. I am certain not only that he will do his job extremely well, but that his collegiality will also contribute to the overall atmosphere of your chambers. I recommend him to you without reservation.

Thank you very much for considering his application. Please feel free to contact me if I may be of further assistance.

Sincerely,
Liam O'Melinn
Professor of Law
Pettit College of Law
Ohio Northern University
Ada, OH 45810
419.772.2207
l-omelinn@onu.edu

April 11, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Re: Adam S. Moore

I am pleased to write in support of Adam Moore, who has applied for a clerkship in your chambers beginning in 2022. I know Adam quite well, and have a good sense of his abilities.

Adam has taken my classes in Constitutional Law, and a seminar on Law & Literature. He excelled in all these classes - top of the class both in grades and quality of class participation. His time on the Law Review, and excellent academic record both testify to his work ethic and his fine analytical skills. For my Law & Literature seminar, he produced a stellar paper examining the topic of child soldiers, both through the vehicle of Beasts of No Nation (examining and comparing the book and the movie versions), and the trial at the ICC of an African commander who was specifically tried on charges of using, and abusing child soldiers. He examined and critiqued the legal structures for addressing such practices, and considered where they fall short. It was the quintessential first-rate law/lit paper, and excelled at the very difficult task he set himself, which entailed reading hundreds of pages of trial testimonies, and synthesizing many aspects of the dramatic telling of the victim's stories.

My interactions with Adam have revealed a student who is intellectually both quick off the mark, and thoughtful, a lovely writer, with mature and sound judgment and an easygoing, steady temperament. I think he would be ideally suited for a judicial clerkship, and I recommend him to you without reservation.

It was my good fortune to have clerked for the Honorable Pierce Lively, who was then the Chief Judge of the United Court of Appeals for the Sixth Circuit. Were he still with us, I would have delighted in sending Adam to Judge Lively - and that is the highest praise I can offer. I am confident he will exceed your expectations in every way.

If I can answer any questions about Adam, please do not hesitate to call me at (419) 772-2228. I would be happy to discuss his candidacy.

Sincerely yours,

Joanne C. Brant
Professor of Law

THE CLAUDE W. PETTIT COLLEGE OF LAW
DEMOCRATIC GOVERNANCE AND RULE OF LAW LL.M.

October 26th, 2021

Recommendation letter to support Mr. Adam Moore's application for externship

Dear Sir/Madam,

I have known Mr. Adam Moore since fall 2019 when he joined the Ohio Northern University Law School. Mr. Moore has been my student, my academic advisee, and has worked as my research assistant in a number of projects I have been working on. In this capacity, I had the opportunity to assess Mr. Moore's intellectual abilities, work ethic, and social skills.

Mr. Moore has proved to be an excellent student in all my classes. He was always prepared for my classes. His class participation was well articulated, thoughtful, and engaging, and I appreciated very much his capacity to grasp complex theoretical issues. He is a very hard-working, organized, and intellectually rigorous person. He handles pressure well and is very committed and conscientious in accomplishing any task assigned to him.

Mr. Moore worked as my research assistant on my project of assessment of the Office of the Special Advisor on Genocide and the Responsibility to Protect, and on a number of my law review articles. As a research assistant, Mr. Moore is detailed oriented, thorough, and analytical. In addition, he has excellent legal analysis and writing skills.

On the personal and social level, Mr. Moore has a positive personality. He is a friendly, polite, and open person. He has a great sense of humor and enjoys learning about other cultures and values. His colleagues speak very highly of him.

I therefore highly recommend Mr. Moore for an externship in your institution. I remain confident that his intellectual capacity, research, writing skills, and hardworking and social attitude, will not only be beneficial to your institution but also will assist him to learn more from you.

Please feel free to contact me if you have any questions or need additional details on this recommendation.

Sincerely,

Jean-Marie Kamatali
Professor of Law
Director, Center for Democratic Governance and Rule of Law

Arts & Sciences • Business Administration • Engineering • Pharmacy • Law

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Too Many Beasts: The Fiction and Reality of Child Soldiers

by Adam Moore*

Introduction

In the book, Beasts of No Nation[1], author Uzodinma Iweala gives a gripping portrayal of life as a child soldier in an unnamed West African nation. Through the eyes of this child—orphaned by the political, social, and military chaos that is engulfing his nation—one gets a glimpse of the reality faced by thousands of children around the world. While exact statistics are hard to come by, it is estimated that hundreds of thousands of children serve in government militaries or armed rebel groups.[2] Despite an abundance of international legal instruments and mechanisms available to address this crisis, it continues to plague our world.

In the following pages, I give an overview of the fictional story presented by Iweala, discuss the current state of international law related to the use of child soldiers, and discuss a recent international criminal case and several issues surrounding the implementation of certain international conventions. In Part I, I review the fictional account presented by Iweala in his novel and discuss the themes relating to the use of child soldiers. Part II is a brief overview of the existing conventions and international legal norms relevant to the use of child soldiers. Part III examines the recent International Criminal Court case of Bosco Ntaganda,[3] a former rebel leader found guilty of, among numerous other crimes, using child soldiers in the Democratic Republic of the Congo. The crimes and witness testimony found in the case mirror many of the themes presented in the book. Part IV looks at some additional literature on the use of child soldiers and critiques of its current implementation, noting some of the problems faced by those seeking protection of children and prosecution of abusers. Finally, I conclude with thoughts on the comparative fiction and reality of the child soldier as presently understood, as well as critiques of the current international response and ideas on how to better address this scourge of society and prevent the further use of child soldiers.

I. Beasts of No Nation, The Book

The novel, Beasts of No Nation,[4] is the debut release of Nigerian author, Uzodinma Iweala.[5] Originally begun as his senior thesis at Harvard University, the story was developed into a full novel that has received much "praise from reviewers for the frighteningly convincing voice of the preteen soldier."[6] Through personal research and

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* This is a scaled-down version of a paper previously submitted for my Law and Literature seminar course.
[1] UZODINMA IWEALA, BEASTS OF NO NATION (2006).
[2] *Facts About Child Soldiers*, HUMAN RIGHTS WATCH (Dec. 3, 2008, 10:22 AM), https://www.hrw.org/news/2008/12/03/facts-about-child-soldiers; *see also* Emeline Wuilbercq, *Factbox: Ten Facts About Child Soldiers Around the World*, REUTERS (Feb. 12, 2021, 12:08 AM), https://www.reuters.com/article/us-global-childsoldiers-factbox-trfn/factbox-ten-facts-about-child-soldiers-around-the-world-idUSKBN2AC0CB (noting 7,740 children reported recruited in 2019 alone, primarily in Africa, and the likely future rise in recruitment as a result of the ongoing Coronavirus health crisis).
[3] Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment (July 8, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF.
[4] IWEALA, *supra* note 1.
[5] Boris Kachka, *Young Gun*, NEW YORK (Nov. 16, 2005), https://nymag.com/nymetro/arts/books/reviews/15105/.
[6] *Id*.

interviews with former child soldiers, Iweala conveys the story and atrocities committed by these individuals in a realistic and sympathetic way.[7]

The book's prose is a bit disjointed, almost purposely flawed. Sentences flow together, words repeat, tenses are misused, and there is no separation between words that are thought and words that are spoken. At first, it is quite awkward. But at some point, it becomes most endearing, as if someone has taught themselves English without ever hearing it spoken. Iweala describes it as, "it's not pidgin English, it's not proper English; it's just sort of the way I hear people speak."[8] Initially disorienting and even frustrating, you ask yourself why an author would force his readers to endure such a style. Soon, however, you realize the first-person narrative used is its essential nature. This is a story conveyed by a child; how they see the world around them, how they understand these horrible events, and this is how they would describe them.

The book opens with the main protagonist, Agu, a young child of unknown age in an unknown West African nation. The reader is instantly introduced to his child-like, broken English. "BRIGHTNESS! So much brightness is coming into my eye until I am seeing purple spot for long time. Then I am seeing yellow eye belonging to one short dark body with one big belly and leg thin like spider's own."[9] You are put into the mind of Agu. He is alone, on an unknown road, no family around him. He is discovered by a rebel soldier just as young as he, looking disheveled with skinny legs and a bulging belly from malnutrition.[10]

Then, the reader is instantly met by the villain of the book. Though there are many villains in this book, both real and metaphorical, the character of Commandant is primary. "He is moving slowly like important person to make sure everybody looking at him is knowing he is chief. All of the other soldier is staring at him like he is king. I am also staring."[11] With these words, you understand the commanding presence Commandant has over Agu, and will continue to have as the book progresses. Agu, a young boy left to fend for himself in the bush due to the warfare raging in his nation and the loss of his family is desperate for some type of salvation, someone to care for him. The recruitment of Agu by Commandant into this rebel group is not difficult. "If you are wanting food, you will eat. And if you are wanting drink, you will drink . . ."[12]

Agu tries to speak but is barely able to get out his own name. He is frozen with fear at the sight of Commandant standing before him with his hand on his gun.[13] This is the moment for Agu and for Commandant. Will Agu join the rebels, or will he be another body on the side of the road as they march on? The sales pitch Commandant gives to Agu is one all too common to children in similar circumstances; faced with no family, no sustenance, no aid or refuge provided by their government or an outside organization. "Do you want to be a

[7] *Id*.
[8] *Id*.
[9] IWEALA, *supra* note 1, at 2.
[10] *Id*.
[11] *Id*. at 5.
[12] *Id*. at 8.
[13] *Id*. at 9.

soldier, he is asking me in soft voice? If you are staying with me, I will be taking care of you and we will be fighting the enemy that is taking your father."[14]

As you read, it is easy to see why this offer is so appealing to Agu. A coup has broken out in his nation, his mother and young sister have been swept off to safety, his father and older brother were killed by government forces after being accused of being rebel spies, which they were not. He lost everything he has ever known; his family, his school, the peaceful world that he once enjoyed without question. Now, as he struggles on his own, a young boy on the cusp of adolescence, he is faced with a life-or-death decision. It is easy to see why Agu, and real-world children similarly situated, would choose to join the rebel group. Survival mode kicks in, and it is easy to accept the first hand that reaches out to help you.

As Agu is initiated into the rebel group, his adulation for and emulation of the Commandant and older soldiers begins to grow. "I am liking the older men and how they are carrying gun and always looking so tough like they are in movie and I am trying to be acting like them . . ."[15] This is a common feature of child soldiers and why some opportunistic commanders seek their recruitment. People of such an impressionable age are easily manipulated. This follows in the book as you see Agu wanting to be more and more like the older boys he sees soldiering around him. He wants to carry a knife like them, then a gun like them, then partake in the drugs they use, then pillage and rape like them. If this is the only source of behavior you are exposed to, and you know that those who do not follow in these actions are not taken care of or even murdered, how could you not want to be exactly like them.

We soon read how ingrained in Agu the actions of a soldier have become. As the rebel group ambushes a government convoy, Agu looks on with excitement. Once nearly all in the convoy are dead, Commandant summons Agu to his side to view a man on his knees begging for his life. "[Commandant] is taking my hand and bringing it down so hard on top of the enemy's head and I am feeling like electricity is running through my whole body."[16] This is Agu's first kill. While hesitant at first, he takes to the action with some relish after the first few strikes. He appears to enjoy the power he has been given, and the positive response from the Commandant and the other soldiers give him a sense of pride. Agu killed an unarmed and captured prisoner of war. He committed his first atrocity. He will commit many more.

As the story progresses, Agu more and more comes under the influence of Commandant. He continues to emulate and admire these grotesque and murderous role models. He sees them as powerful and strong and wants to be like them. As he follows their directions and emulates their actions, Agu views himself as becoming an adult. He is transformed. "All we are knowing is that, before war we are children and now we are not."[17] It is hard to argue with this view. The age at which one transitions from childhood to adulthood can be quite relative, based

[14] IWEALA, *supra* note 1, at 11.
[15] *Id*. at 13.
[16] *Id*. at 21.
[17] *Id*. at 36.

on culture, religion, or any number of factors. Does committing the actions typically associated with those of an adult actually make one an adult? In Agu's eyes, he is a soldier and an adult. He is no longer a child.

As Agu falls further under the influence of Commandant, he is made one of his personal bodyguards. At first, Agu is elated with this prestigious position and its proximity to his leader. Soon, we find out the terrible reason he has been promoted to the inner circle like Strika before him. "I do not want to be taking off my clothe, but I am not saying so because Commandant is powerful more than me and he is also sometimes giving me a small favor . . ."[18] Agu, like so many real-world child soldiers, is sexually abused. This is a common phenomenon with child soldiers, both boys and girls. They are treated as property, sexually abused, traded among commanders, and sold off to outside groups.

After weeks of trench life—no food or fresh water, living in feet of dirty water, being strafed by government soldiers—the rebels rise in revolt against Commandant. They announce, one by one and soon in unison, their intention to leave. Commandant, sitting on his makeshift throne of dirt and a few banners, challenges their assertion, and calls them fools. Without a thought, Rambo, so nicknamed by Agu for his fearlessness and likeness to the movie character of the same name, shoots Commandant. "Then he is just taking his gun and shooting him. Only one shot just right in the chest . . . his body is just falling and making the water that is running down the trench red like that."[19] This sudden act hits Agu like a bolt of lightning. He did not realize it was so easy to kill Commandant. Just like the civilians he has seen die so many times before, Commandant was simply shot and fell to the ground. A sudden fear of realization washes over Agu. He is no longer subject to Commandant. He is free. With that, however, comes uncertainty. He has been a soldier for some time and his path forward is uncertain and terrifying. Slowly, he follows the other soldiers out of the makeshift camp and begins the wandering trek back to civilization.

After Agu's journey to salvation, he is taken to a mission to recover and live. He and the other boys are looked after by Amy, a missionary, and Father Festus. They are given clothes, their own bed, books to read, and more food than they can eat. They play on the beach and sit by the fire at night. Agu is finally at peace and happy. He discusses his future with Amy and his desire to keep learning like he was with his father and mother before the war. Despite all this, he is haunted by his past actions and experiences. Sitting with Amy one day, as she tries to help him open up about his experiences, he tells her,

> I am saying to [Amy] sometimes, I am not saying many thing because I am knowing too many terrible thing to be saying to you. I am seeing more terrible thing than twenty thousand men. So if I am saying these thing, then it will be making me to sadding too much and you to sadding too much in this life. I am wanting to be happy in this life because of everything I am seeing. I am just wanting to be happy.[20]

He still has the visage of a young boy, but he has lived the life of many men and the horrors he experienced will live with him for the remainder of his life.

[18] IWEALA, *supra* note 1, at 84-85.
[19] *Id*. at 122-23.
[20] *Id*. at 141.

So ends the struggle of Agu and his time as a rebel soldier. While the novel closes on a positive note, with Agu safe and cared for, it reminds us of the scars, both seen and unseen, that he will live with for the remainder of his life. This is fiction, but it is also the reality of the child soldier. Those who are lucky enough to survive the battles and atrocities remain haunted by their experiences and actions. They have suffered a trauma that will follow them the remainder of their lives.

II. International Law and Child Soldiers

The field of international law is often viewed as daunting and ambiguous. It is sometimes hard to tell where national sovereignty ends and international law begins, particularly when dealing with conflicts internal to a nation's borders. Despite its often-maligned applicability and adherence, international law has done much to address issues common to all nations and condemn those actions universally viewed as contrary to the modern moral standards of society. To understand the role of international law, and more to the point, international criminal law, as it is applied to the use of child soldiers, it is helpful to briefly review four international conventions: the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention),[21] the Convention on the Rights of the Child,[22] the African Charter on the Rights and Welfare of the Child,[23] and the Rome Statute of the International Criminal Court.[24]

A. The Fourth Geneva Convention

The four Geneva conventions are a series of attempts by the global community to lessen the harsh effects of war and mandate some civility in its conduct. Starting with the first in 1864, and leading through to the second, third, and fourth—all of which followed the devastation of World War II in 1949—the conventions as a whole have become a part of customary international law, applicable upon all nations, and seek to ensure the honorable conduct of war operations and the protection of soldiers, prisoners, wounded, sick, and civilians.

While the Geneva conventions did not specifically address the use of child soldiers in armed conflict, the fourth convention did recognize those civilian children under fifteen as a protected class. In particular, article 14 mandates that all State Parties shall ". . . protect from the effects of war . . . children under fifteen . . . ."[25] Article 24 goes on to state, "[t]he Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or separated from their families as a result of the war, are not left to their own resources."[26] Finally, article 77 of the Additional Protocol I, adopted in 1977, of the Geneva conventions adds that State Parties shall protect children "against any form of indecent assault."[27]

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[21] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug 12, 1949, 75 U.N.T.S. 287 [hereinafter the Fourth Convention].
[22] Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3 [hereinafter the Convention].
[23] African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 [hereinafter the African Charter].
[24] Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter the ICC Statute].
[25] Fourth Convention, *supra* note 21, at art. 14.
[26] *Id*. at art. 24.
[27] Helen Berents, *'This Is My Story': Children's War Memoirs and Challenging Protectionist Discourses*, 101 INT'L REV. RED CROSS 459, 469 (2019).

These articles, limiting as they may appear, have served as a foundational basis for the future protection of children in times of armed conflict. Given their time in existence and near-universal adoption and adherence, they have become jus cogens—norms of international law to which no state can deny adherence. With that universality also comes their applicability on non-state actors and to non-international armed conflicts—those wars and skirmishes taking place outside the traditional nation on nation setting. The articles serve as a last resort for the protection of children and as a foundation for all other protection-oriented conventions that followed.

B. The Convention on the Rights of the Child

This convention has become one of the fastest and most universally adopted international conventions in history, with less than a year passing between its introduction and its entry into force.[28] As the politics and borders of the world began to change in the late-80s, the world recognized a need to ensure the protection of children from the harmful effects of war, famine, and poverty.

In contrast to the previous Geneva conventions, the Convention specifically prohibits State Parties from using child soldiers in armed conflicts. Article 38 states, "State Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces."[29] The article goes on to mandate a broader protection in that "State Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."[30]

The first Optional Protocol to the Convention, entered into force in 2002, has since extended the age of minority from fifteen to eighteen. This Protocol, not surprisingly, was the subject of much debate on the issues of cultural relativism and the recognition of adulthood by various nations and peoples.[31] Despite this, a majority of State Parties to the Convention have adopted the additional Protocols and thereby ensured the continued protection of minors from the recruitment into armed forces and use in armed conflicts.

C. The African Charter

This Charter was adopted by the Organization of African Unity (subsequently the African Union) in 1990 to address the serious problem of the use of child soldiers in armed conflict that was prevalent on the African continent. While it is only a regional convention, its notable for going beyond the previous international agreements.

Articles 1 and 2 mandate that all State Parties shall abide by international humanitarian law and ensure that no child is recruited or takes direct part in hostilities.[32] Article 3 goes beyond the traditional notions of treaty adherence and imposes the obligations of protection of children from hostilities on non-state actors by noting the provisions "shall also apply to children in situation of internal armed conflicts, tension and strife."[33] This

[28] Convention on the Rights of the Child, UNHCHR https://www.ohchr.org/en/professionalinterest/pages/crc.aspx (last visited April 17, 2021).
[29] The Convention, *supra* note 22, at art. 38(3).
[30] *Id*. at art. 38(4).
[31] Alison Dundes Renteln, *The Child Soldier: The Challenge of Enforcing International Standards*, 21 WHITTIER L. REV. 191, 196 (1999).
[32] African Charter, *supra* note 23, at art. 1-2.
[33] *Id*. at art. 3.

additional mandate addresses the issue, prevalent in many African nations at the time of its adoption and up to the present, of internal rebellions, civil wars, and coups d'état. Despite its non-applicability to nations not party to the African Union, it does provide a guide to future conventions and protocols that would impose a duty on all parties, state and non-state alike, to protect children from recruitment and use in armed conflicts.

D. The ICC Statute

After decades of debate and negotiation, the Rome Statute entered into force in 2002 and ushered in a new era of international criminal law. With this new international court, the perpetrators of the worst atrocity crimes would not be able to avoid justice. The International Criminal Court, established by the statute, seeks to investigate, prosecute, and hold responsible those individuals responsible for war crimes and crimes against humanity when their home nations are unable or unwilling to do so.

Of particular note for this discussion is Article 82, which list the war crimes over which the court will have jurisdiction. Subsection (2)(b)(xxvi) makes it an international war crime to conscript or enlist children under the age of fifteen into armed forces or to use them in hostilities.[34] Through this article, those within the borders of State Parties, either at the time of commission of the crime or subsequently when an arrest warrant is issued, become subject to the court's jurisdiction when they are found to have recruited or utilized child soldiers in armed conflicts. As will be seen in the next section, this article has been utilized to bring to justice some of the worst abusers and opportunists in terms of the use of child soldiers.[35]

III. Child Soldiers and the International Criminal System

To gain a better sense of the reality of the use of child soldiers and the application of the international criminal law system, it is helpful to look to a recently decided case before the International Criminal Court. The Prosecutor v. Bosco Ntaganda[36] concerns the recent conviction of a former rebel leader from the Democratic Republic of the Congo (DRC).[37] Among his eighteen charges was violation of the ICC Statute in recruiting and using child soldiers under the age of 15 in armed conflict.[38] While all of his war crimes and crimes against humanity were severe, I feel, given the theme of this paper, focusing on the charge of recruitment and use of child soldiers is the most germane.

Bosco Ntaganda was a former rebel commander of the Forces Patriotiques pour la Liberation du Congo (FPLC), the military wing of the rebel group Union des Patriotes Congolais (UPC), operating in the resource rich Ituri region of eastern DRC.[39] Upon referral of his crimes in 2004 to the ICC by the DRC, a state party to the ICC

[34] ICC Statute, *supra* note 24, at art. 82(2)(b)(xxvi).
[35] *See infra* Part IV.
[36] Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment (July 8, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF [hereinafter Ntaganda Case].
[37] *See* Crystal E. Lara, *Child Soldier Testimony Used in Prosecuting War Crimes in the International Criminal Court: Preventing Further Victimization*, 17 SW. J. INT'L L. 309, 310 (2011) (discussing the first case before the ICC of Thomas Lubanga (Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 (2012)), the supreme commander of the FPC/UPLC, and noting the conflicts in the DRC have led to 5.4 million deaths, with children accounting for 47 percent despite comprising only 19 percent of the general population).
[38] News Release, *ICC: Congo Warlord Guilty of Crimes Against Humanity*, HUMAN RIGHTS WATCH (July 8, 2019, 6:50 AM), https://www.hrw.org/news/2019/07/08/icc-congo-warlord-guilty-crimes-against-humanity.
[39] Ntaganda Case, Timeline, INTERNATIONAL CRIMINAL COURT https://www.icc-cpi.int/drc/ntaganda (last visited April 17, 2021).

Statute, an investigation was commenced, and subsequent arrest warrants issued.[40] In March 2013, in Kigali, Rwanda, Ntaganda surrendered himself to ICC custody.[41] His subsequent trial, lasting from September 2015 to July 2019, ended with a verdict of guilty and a sentence of thirty years being imposed upon him for his multiple war crimes and crimes against humanity.[42]

For the purposes of this paper, this case is relevant in that a notorious user and abuser of child soldiers was brought to justice. Additionally, some of the testimony of former child soldiers, under Ntaganda's command, can shed light on the reality of child soldiers as compared to the fictionalized portrayal of Beast of No Nations. By understanding these witness statements, one can better understand the unfortunate and brutal reality of child soldiers and see that the fiction presented by the book mirrors the reality faced by countless children in our modern world.

In reviewing the testimony of one witness for the prosecution, designated P-0898 for anonymity purposes, the judgment opinion noted the witness,

> [T]estified that in August 2002, when he was 13 years old, and at a time when the Lendu and the APC attacked Hema villages, killing people, including his uncle, he decided to join the UPC to protect the Hema civilian population. For that purpose, he told the soldiers who were already being trained that he wanted 'to become like them'. The soldiers informed him that he needed to follow military training, whereupon he went to the training centre at the UPC HQ. He arrived at the centre with other people from the neighbourhood, some of whom were older than him and some of whom were of his age.[43]

In this testimony, we are presented with a young man, thirteen at the time, who was put into a situation where he felt compelled to join the rebel group. The loss of family members, coupled with the death and chaos around him, led this young man to join, train, and act as a soldier. The parallels between this witness and the story as presented in the book discussed above are poignant. In a similar way, Agu was surrounded by fighting, chaos, and death. He had lost members of his family to the conflict ongoing in his nation. While witness P-0898's joining of the rebel group may seem voluntary compared to the pressure-filled situation in which Agu joined, both illustrate the fine line between voluntary and involuntary service of child soldiers. It could be argued that both P-0898 and Agu voluntarily joined. For example, in the book Commandant asked "[d]o you want to be soldier," and Agu nodded in the affirmative.[44] These two child soldiers, one fiction and one not, illustrate that such a fine line can often be hard to distinguish. Was there enlistment in these rebel groups truly voluntary, or had the circumstances surrounding them compelled their enlistment?

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[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] Ntaganda Case, *supra* note 36, at ¶ 353.
[44] IWEALA, *supra* note 1, at 11.

Another witness for the prosecution, designated P-0010, illustrates the reality of rebel commanders utilizing child soldiers. The judgment opinion noted,

> The witness testified to having been enlisted with the UPC/FPLC in 2002, when she was 13 years old. She stated she followed training in Rwampara and Mandro, served in Mr Ntaganda's personal escort, and participated in UPC/FPLC military operations. She further testified about sexual violence she witnessed and experienced during her time with the UPC/FPLC.[45]

In reading Beasts of No Nation, one can only hope that the use of child soldiers and infliction of such brutality upon their minds and bodies is solely the realm of fiction. As can be seen by the facts offered by witness P-0010, that is not the case. Much like Agu, this witness was enlisted by the FPLC at a very young age, was trained to be a fighter, and acted as a personal escort for Ntaganda. Despite Ntaganda's refusal to acknowledge such things occurred, the prosecution offered video evidence showing young children, armed with assault rifles, acting as his personal escort during recorded visits to training camps. Much like Agu, this witness found themselves recruited into a rebel group, trained to be a soldier, taken in by the commander, a person of strong personality and presence, and subjected to continuous physical, sexual, and emotional abuse. The power these rebel commanders have over the child soldiers under their charge, as depicted in the book, is all too real.

Finally, witness for the prosecution, designated P-0010, demonstrates the unwelcoming reality many child soldiers face when they attempt to return to their previous lives. The judgment opinion noted,

> The witness testified to having been abducted in October 2002, when she was 12 years old, on her way home from primary school, and taken to Bule camp for training, where she was mistreated and sexually abused. She stated that after having received treatment for an injury inflicted during a battle in Largu in March 2003, she returned to her village, where both her parents had passed away, and gave birth to a child without knowing who the father was.[46]

This witness, abducted, forced to train and fight, sexually abused, and left with a fatherless child to care for, once again demonstrates the tragic reality of child soldiers. Despite some differences between this witness' reality and the fiction presented by Agu, the pattern of abuse and consequences of these events is most similar. Both the story presented in the book and this testimony presented in the trial demonstrate the difficulty faced by child soldiers, at least the ones who are lucky enough to return to their homes after the conflicts have ended. All too often, they are unable to process their new situations or come to terms with their past actions. More often than not, they are shunned by their communities for the actions they have committed and the involuntary abuses they have suffered.

[45] Ntaganda Case, *supra* note 36, at ¶ 89.
[46] *Id*. at ¶ 174.

IV. The Continued Use of Child Soldiers and Critiques of the Current System

The use of child soldiers in armed conflicts is an injustice that continues to plague our world. One of the primary issues is the cultural differences in identifying the age of majority for participation in combat. Depending on the nation, region, history, or culture, the age of identifiable majority can vary by many years. After all, children in combat are not an uncommon part of history.[47] While they were traditionally in auxiliary roles, playing the battle calls or carrying supplies, there presence on the front lines was not uncommon.[48] For some, overcoming this historical tradition is not an easy task.[49] Some cultures do not see being a child and being a soldier as being incompatible.[50] Some traditional societies, adhering to past tribal and cultural norms, identify no fixed age at which children were permitted to participate in hostilities.[51] There is a stark societal difference between these categorizations as understood in Western societies compared to those of other cultures, particularly in Africa and other regions that still practice more traditional ways of child-rearing.

Without global agreement and understanding of a fixed age of majority for participation in armed conflicts, the use of child soldiers will persist, particularly among those cultures that see nothing wrong with such participation or adhere to an earlier age of majority than that identified by the relevant international treaties. Without consensus and promoted awareness of the currently convention-recognized minimum age of eighteen, it is problematic to fault those who permit the voluntary admittance of child soldiers into their military ranks.

As can be seen in the fictional story and real-life witness excerpts from the Ntaganda case, it can be hard to draw an identifiable line between voluntarism and coercion by circumstance when it comes to children under eighteen enlisting with military groups.[52] Are these child soldiers aware of what they are enlisting to do, or are they simply desperate to survive? As previously noted, cultures and even scholars differ on this issue. Despite the international conventions identifying eighteen as the appropriate age for such combat participation, debates—both psychological and anthropological—persist over the mental and emotional capacity of children to make such an informed decision.[53]

Some scholars view the use of child soldiers as a modernized form of slavery and, at the very least, human trafficking.[54] Their vulnerability makes them easy prey, and it is hard to argue that their actions can be viewed as voluntary.[55] A problem at the heart of the issue is instability and a lack of rule of law. Developing nations, suffering from "political, economic, and social instability" are fertile ground for the coerced enlistment of

[47] MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 27-8 (2012).
[48] *Id.*
[49] *Id.*
[50] DAVID M. ROSEN, CHILD SOLDIERS: A REFERENCE HANDBOOK 14 (2012).
[51] *Id.* at 47.
[52] *See* Renteln, *supra* note 31, at 202-3 (Discussing the phenomenon of child soldiers as a rite of passage in many societies, or the military serving as a substitute family, or religious, political, or economic motivations.).
[53] DRUMBL, *supra* note 47, at 17-18.
[54] Susan Tiefenbrun, *Child Soldiers, Slavery and the Trafficking of Children,* 31 FORDHAM INT'l L.J. 415, 417 (2008).
[55] *Id.* at 420.

children into armed groups.[56] Commanders are constantly looking for bodies to fill out their ranks. As older soldiers die in battle and become less readily available—often due to ongoing conflicts, shifting alliances, and disease—child soldiers are an "easily obtained" source of fighting power.[57] During the Sierra Leone civil war of the 1990s, it is estimated that roughly one million children were displaced and twenty-five thousand were forced to participate in hostilities.[58] Under such chaotic circumstances, it is hard to show that a child enlisting—even with a justifiable motivation to defend family, nation, and beliefs—is acting under a purely voluntary mindset. The prevalence of "forced conscription," of children who have lost everything they know—their families, their homes, and their innocence—calls into question their ability to do anything on a voluntary basis.[59] Can actions taken through an innate will to survive truly be classified as voluntary?[60]

In terms of liability, it can be argued that any actions in which a child soldier participated were done under duress and, therefore, lacked the necessary awareness and intent to show culpability.[61] Of course, to hold this assessment as true we must again go to the debate of voluntarism versus coercion, and measure the totality of the circumstances to determine whether their actions were voluntary or if their age, maturity, and circumstances negated that possibility.

As was illustrated in the book with Agu being resettled at a mission along with the other boys, or some of the witnesses in the Ntaganda case being brought forth to give testimony and not to face charges, common decency and prosecutorial discretion mean many former child soldiers will not face charges for the actions they committed. However, this does not address the scars, both figurative and literal, they must carry for the rest of their lives. While there are many noteworthy programs that assist in their reintegration post-conflict, it is often hard to remedy the emotional and reputational damage done to them.

The international conventions and current international criminal system have come a long way in addressing the issue of child soldiers, clarifying the age of majority, and bringing to justice those who utilize minors in combat situations. Despite these great strides, much remains to be done. Unfortunately, the current focus of the international system, as is often the case, is on post-conflict remedies and prosecutions. This does little to protect those children whom now and, in the future, will be subjected to enlistment as soldiers. Without a realignment of the current system to focus not only on punishment but also on prevention, it seems likely that this problem will persist for the foreseeable future. Awareness of the current international understanding on the age of majority being eighteen must be made a priority. Additionally, addressing the root causes of enlistment, whether arguably voluntary or coerced, of child soldiers (i.e., social, economic, and political instability) is needed to ensure that situations do not continually arise where children are placed in impossible situations where a choice between fighting or death is their only option. Given the scale of addressing such issues, and the inability of the

[56] *Id*. at 421.
[57] Lara, *supra* note 37, at 314.
[58] *Id*.
[59] *Id*. at 427.
[60] *See* Lara, *supra* note 37, at 314.
[61] *Id*. at 80.

international community to come together on such issues, the concept of humanitarian intervention on behalf of affected children should be given greater weight. Once the world becomes aware of such illegal use of child soldiers, whether the conflict be international or non-international in nature, the global community should devise a system that recognizes the need for intervention and protection of the children affected, despite any issues related to regional or global politics or claims of sovereignty.

Conclusion

As one reads the novel, Beasts of No Nation, you are struck by the brutality of Agu's life. The actions by Commandant seem monstrous, almost inhuman. It is hard to imagine such things can be conjured onto a page by an author. As you continue through the story, through the abuse and killing, you must remind yourself that this is fiction. You tell yourself that this is an imagined world that is meant to keep the reader entranced and turning each page to see what happens next. Then, you seek out the reality of the child soldier and a case like that presented by the ICC's prosecution of Bosco Ntaganda. The comfort of a fictional shield is shattered. You realize all too clearly that the fictionalized story presented by Iweala is the unfortunate reality faced by numerous children throughout the world.

Iweala does an amazing job of presenting the themes of desperation, isolation, revenge, obedience, emulation, family, belonging, abuse, development, and rationalization in his novel. While the story is hard to endure, it provides a realistic glimpse into the lives of child soldiers and their motivations.[62] You can see how a child can find themselves confronted with the often-limited option of death or participation in a violent military group. You can see how they progress, both in life experience and brutality. You better understand how someone so young becomes capable of actions so terrible. The novel gives you a foundation with which you can read the testimony of a former child soldier and have a better understanding for how and why they can participate in atrocities many of us would find unimaginable. The novel presents the world with a harsh reality that can better inform how we address the scourge of child soldiers so prevalent in our modern world.

The progression of international law over the past century has attempted to address and criminalize the use of child soldiers in armed conflicts. The Convention has outlawed their recruitment and use in conflicts, and the African Charter has extended that mandate, on a regional level, to non-international conflicts. The ICC Statute imposes criminal liability on those who violate this international norms. Some of the first cases before the newly constituted ICC in the early 2000s included charges of using child soldiers in violation of international conventions and resulted in convictions of those perpetrators.

Despite progress and some success, there is still more to do. Awareness of this problem is key. Understanding and agreement across nations and cultures of a standardized age of majority of eighteen needs to continue. A realistic and unified approach to protection and intervention of children at risk of recruitment must be sought by

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[62] *See* Madeleine Hron, *"Ora Na-Azu Nwa": The Figure of the Child in Third-Generation Nigerian Novels*, 39 Research in African Literatures 2, 28-29 (2008) (noting the child figure as critical in African and Nigerian literature and their place within the literature and debates of culture and society).

the international community. Absent prevention, the world must ensure that former child soldiers receive every needed resource necessary to reintegrate into society and address the trauma issues that are pervasive for survivors.

The fiction and reality of child soldiers is tragic. Whether reading a novel telling a fictionalized story or reading a witness statement recounting a lived or committed atrocity, this is an issue of a global society. It is disheartening when the most tragic and compelling work of fiction is only a small window onto the reality faced by so many child soldiers. Despite this, such fiction provides awareness and creates new dialogues. Hopefully, exposure to this problem and discussion of future solutions will lead to continued progress and lessen, or someday end, the terrible crisis of child soldiers.

Applicant Details

First Name	**Dylan**
Last Name	**Moore**
Citizenship Status	**U. S. Citizen**
Email Address	**dylmoore@uchicago.edu**
Address	**Address** Street **5317 S. Kimbark Ave., Apt. 2B** City **Chicago** State/Territory **Illinois** Zip **60615**
Contact Phone Number	**3173617883**

Applicant Education

BA/BS From	**Indiana University-Bloomington**
Date of BA/BS	**May 2019**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 12, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Legal Forum**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Levmore, Saul
s-levmore@uchicago.edu
773-702-9494
Strauss, David
david_strauss@law.uchicago.edu
773-702-9601

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Dylan Moore
5317 S. Kimbark Avenue, Apartment 2B
Chicago, IL 60615

June 14, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a second-year law student at the University of Chicago Law School writing to apply for a clerkship with your chambers for the 2022 term.

I have a deep passion for constitutional law and the federal judiciary with aspirations to one day become a professor of constitutional law. I would greatly appreciate the opportunity to contribute to the judicial process firsthand under your mentorship as one of your clerks.

Last summer, I had the opportunity to clerk with the Institute for Justice, a nationwide nonprofit litigation firm. In addition to having me complete internal legal research and writing assignments, my managing attorneys trusted me to ghostwrite more high-profile pieces. Among these were model legislation, a brief, and an op-ed. My time at the Institute for Justice allowed me to hone my research and writing skills while assisting public interest attorneys in asserting individuals' constitutional rights.

I was recently named the Executive Articles Editor of *The University of Chicago Legal Forum*, the University's topical law journal. Additionally, my Comment concerning workers' compensation law in the wake of the COVID-19 pandemic has been selected for publication later this year. I am eager to utilize the research and writing skills I developed while drafting my Comment to assist your chambers in adjudicating cases.

Attached, please find a copy of my resume, transcript, and writing sample. Letters of recommendation from Professors Saul Levmore and David Strauss will arrive separately. Please let me know if there is any other information I can provide. Thank you for your consideration.

Sincerely,

/s/ Dylan Moore

Dylan Moore

Dylan Moore

5317 S. Kimbark Ave. Apt. 2B, Chicago, IL 60615 | dylmoore@uchicago.edu | (317) 361-7883

EDUCATION

The University of Chicago, Chicago, IL
Candidate for Juris Doctor, June 2022
- Journal: Executive Articles Editor, *The University of Chicago Legal Forum*
- Publications: Dylan V. Moore, Comment, *Striking a New Grand Bargain: Workers' Compensation as a Pandemic Social Safety Net*, 2021 U. CHI. LEGAL F. ____ (forthcoming).

Emory University, Atlanta, GA
Candidate for Juris Doctor, August 2019 – June 2020
- Honors: Fall 2019 Dean's List; Dean's Teaching Award in Legal Writing I

Indiana University, Bloomington, IN
Bachelor of Science in Business Economics: Public Policy Analysis, May 2019

EXPERIENCE

Foundation for Individual Rights in Education, Philadelphia, PA
Legal Clerk, June – August 2021

Institute for Justice, Minneapolis, MN
Dave Kennedy Fellow, May – August 2020
- Evaluated potential cases concerning the Tax Injunction Act and Minnesota officer immunity doctrine in tandem with senior attorneys to determine whether the Institute for Justice should litigate
- Drafted memoranda for ongoing litigation addressing issues such as standing and the delegation of powers to assist Institute for Justice attorneys in preparation for arguments
- Ghostwrote model legislation for distribution to lawmakers across the country which allows states to keep track of abusive municipal fines and fees practices
- Conducted a fifty-state survey of telehealth laws to identify which states have exhibited effective policy responses in the wake of the COVID-19 pandemic

Emory Law School, Atlanta, GA
Research Assistant for Professor Joanna Shepherd, May – August 2020
- Compiled a database of Article III judicial appointments in conjunction with other Research Assistants to investigate demographic differences in appointments across presidential administrations
- Analyzed judicial behavior using Lex Machina to track judges' decision making in employment law cases

Buckeye Institute, Columbus, OH
Economic Research Intern, May – August 2018
- Analyzed and synthesized key points of economic research papers focused on cutting-edge findings in the field
- Ran regressions in Stata (an economic modeling program) to analyze the effects of Medicaid expansion in Ohio

Cato Institute, Washington, DC
Media Relations Intern, May – August 2017
- Edited op-eds written by scholars for national publication to ensure clarity of arguments and no copy errors
- Presented synopses of noteworthy news stories during daily staff meetings to identify important current events for Cato scholars to address

INTERESTS

Meditation, skeet and sporting clay shooting, cooking

Advising Document - Do Not Disseminate

Name: **Dylan Moore**
Student ID: **2419722**

Institution Info: Emory University
Student Address: 370 W Hawthorne St
Zionsville, IN 46077-1707
Print Date: 10/15/2020

Beginning of Academic Record

Fall 2019

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	505	Civil Procedure	4.000	4.000	A-	14.800
LAW	510	Legislation/Regulation	2.000	2.000	B+	6.600
LAW	520	Contracts	4.000	4.000	A	16.000
LAW	535A	Intro.Lgl Anlys, Rsrch & Comm	2.000	2.000	A	8.000
LAW	550	Torts	4.000	4.000	A-	14.800
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	599B	Career Strategy & Design	0.000	0.000	S	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.763	Term Totals	16.000	16.000	16.000	60.200
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.763	Comb Totals	16.000	16.000	16.000	60.200
Cum GPA	3.763	Cum Totals	16.000	16.000	16.000	60.200
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.763	Comb Totals	16.000	16.000	16.000	60.200

Spring 2020

Program: Doctor of Law
Plan: Law Major

Semester significantly disrupted starting 3/11/2020 due to the Coronavirus COVID-19 outbreak. The law school adopted mandatory pass-fail grading for all spring 2020 courses, indicated by Satisfactory/Unsatisfactory grades. Arrangements were made for these courses to meet graduation requirements.

Course		Description	Attempted	Earned	Grade	Points
LAW	525	Criminal Law	3.000	3.000	S	0.000
LAW	530	Constitutional Law I	4.000	4.000	S	0.000
LAW	535B	Introduction to Legal Advocacy	2.000	2.000	S	0.000
LAW	545	Property	4.000	4.000	S	0.000
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	601B	First Amendment:Rel.Freedom	3.000	3.000	S	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	16.000	16.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	16.000	16.000	0.000	0.000
Cum GPA	3.763	Cum Totals	32.000	32.000	16.000	60.200
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.763	Comb Totals	32.000	32.000	16.000	60.200

Advising Document - Do Not Disseminate

Name: **Dylan Moore**
Student ID: **2419722**

Law Career Totals

Cum GPA:	3.763	Cum Totals	32.000	32.000	16.000	60.200
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.763	Comb Totals	32.000	32.000	16.000	60.200

End of Advising Document - Do Not Disseminate

THE UNIVERSITY OF CHICAGO

Name: Dylan Moore
Student ID: 12284985

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2020
Current Status: Active in Program
J.D. in Law

External Education

Indiana University Bloomington
Bloomington, Indiana
Bachelor of Science 2019

CREDIT AWARDED FOR ACADEMIC WORK DONE AT EMORY UNIVERSITY SCHOOL OF LAW, 2018-2019
38

Beginning of Law School Record

Autumn 2020

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	178
LAWS	43280	Competitive Strategy Eric Budish	3	3	182
LAWS	44121	Introductory Income Taxation Julie Roin	3	3	179
LAWS	68711	Workshop: Legal Scholarship Lisa Bernstein	3	0	IP
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process David A Strauss	3	3	181
LAWS	42801	Antitrust Law Eric Posner	3	3	176
LAWS	43218	Public Choice Saul Levmore	3	3	182
LAWS	68711	Workshop: Legal Scholarship Lisa Bernstein	1	0	IP
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Spring 2021

Course		Description	Attempted	Earned	Grade
LAWS	41101	Federal Courts Alison LaCroix	3	3	177
LAWS	42301	Business Organizations Saul Levmore	3	3	176
LAWS	52213	First Amendment Theory Erin Lynn Miller	3	0	
LAWS	68711	Workshop: Legal Scholarship Lisa Bernstein	2	0	IP
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

End of University of Chicago Law School

Date Issued: 06/10/2021

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
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Revised 09/2016

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May 12, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Dylan Moore, a student whom I have come to know this year, has expressed great interest in clerking for you, and I think he is someone certainly worth meeting, and then engaging as a clerk if the fit seems right. Dylan transferred here for all the right reasons, looking for intellectual challenges, engaging classmates, and doses of law and economics. He has grabbed these offerings despite the difficulties of this pandemic era, and I admire him for that. He organizes breakfasts (with me, for example) on Zoom, with classmates, and does plenty of other things to make friends and also to learn as much as he can about law and politics. I wish I had been more like that when I was at that age.

Dylan has great (but not excessive in my view) faith in markets, and in people's ability to decide things for themselves. This world-view, often associated with the Federalist Society, does not define him, but rather opens his mind to thinking about legal topics in a way that is somewhat out of fashion in his generation. He thinks, for example, about deferring to markets and interpreting statutes as they are written, rather than as a roommate or set of students might wish they were understood. At the same time, he is nothing short of terrific in adjusting to new evidence or to good arguments thrown at him. He thinks before he speaks, and then what comes out is often unexpected but very solid. Just this morning, to take one example, we were talking about social and legal conventions about bargaining. Why do people feel free to make offers at a car dealership or to an opponent in civil litigation, or even to a law school admissions/financial aid office, but not to a law firm (where it is assumed that all starting associates will be paid the same) or to restaurants, and so forth. I did not have the nerve to ask him about clerkship applications though we (and other students) did wander over to dating habits. He and others brought up various theories and he, especially, has a good and quick manner of offering counter-examples, and of wondering what bargains would be accepted by law, and why that might make sense. As you can see, he is the sort of outspoken (yet respectful) student that makes my job a pleasure. I do think it will be the same for you.

I should add a thought about his law school performance, though we have limited evidence at present. He is in my Business Organizations (Corporate Law) right now, and every time I call on him he moves the class along in a way that is responsive and that also engages his classmates. I would bet that he will earn one of the highest grades in the class, but we are on the Quarter system, so I dare not wait for my exam and its grades (well into June) before writing to you.

Sincerely,
Saul Levmore

Professor David A. Strauss
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June 11, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend Dylan Moore, who has just finished his second year here, for a clerkship with you. Dylan was in my constitutional law class in our winter quarter, and I spoke with him outside of class as well. He is a smart person and a very clear thinker. But what most stood out, to me, was his wide-ranging intellectual curiosity. He was not content just to learn the material in the class; he wanted to think about it at a deeper level and challenge himself to see connections and issues that are not obvious. That, in turn, made him even more analytically insightful.

Let me give two examples. When we discussed Lochner v. New York in class, I said that the mainstream view is that the decision is wrong but that there are people who disagree, especially in academia. I invited the class to criticize the mainstream view and defend Lochner. Dylan took me up on the invitation, both in class and in a later conversation outside of class. He made his arguments thoughtfully and carefully, without overstatement, and without invoking undefended political or ideological premises. What struck me most of all, though, was that I came away from the discussions unsure about what Dylan's own views are. I think he wanted to try to make the best arguments he could, against the conventional view, in order to open his mind to both sides of the issue and to think through his own position. In the process, he demonstrated real dexterity in how he used the text and history, as well as more policy-oriented arguments, to defend the position he was taking. It was an impressive level of engagement, especially for a second-year law student.

The other example is one of the answers he gave on the exam for the constitutional law class. Dylan's exam overall was very good – the grade was between a straight A and an A minus, which placed him in about the top fifteen percent of the class. There were one or two bobbles on one of the questions – he slightly misread a case we studied, and on a few points he did not make his points quite squarely enough – and that prevented him from getting an even better grade, although, in fact, there was not a lot of room between his exam and the very best exams in the class.

But his answer to one of the exam questions really stood out. The question asked him to discuss, with reference to various prominent decisions, the relationship between interpretations of the Equal Protection Clause and so-called modern "substantive due process" cases, like those dealing with contraception, abortion, and same-sex intimacy. His answer was filled with subtle insights. He discussed the varying ways in which the Supreme Court invokes "tradition" in the substantive due process cases, how the Court does not always seem to mean what we would ordinarily think of as tradition, and what the Court seems to mean instead. He explained how the substantive due process cases and the equal protection cases, although derived from different clauses and apparently resting on different precedents and different history, often complement each other.

His answer showed not just an understanding of the material but real mastery; he had put it all together. He saw how apparently disparate principles related to each other. Dylan has mentioned to me that he might want to be an academic, and the way he approached the material was characteristic of good academic writing, and for that matter characteristic of good teaching, too: he tried to present the material as a whole, to the extent he could, rather than as just a series of disconnected decisions or doctrines, but he did not force an artificial unity on the material. It was also the kind of thing a good advocate can do: Dylan identified both unobvious sources of support for a position and potential weaknesses that might not be immediately apparent.

Dylan transferred to our law school from Emory and, of course, because of the pandemic, he joined us at a time that was particularly difficult for transfer students. His second-year classmates had spent a year together (two-thirds of it in person), and he was joining classes that were taught entirely remotely, as mine was, or in a hybrid format. Although I am sure his classmates were welcoming, he did not have the opportunity for anything approaching the kind of informal interactions that are so important in acclimating students to a new law school. As far as I could tell, none of that held him back. He was a full participant in class – at a high level, as I have said. He seemed to fit in very well with his classmates. I think he will approach a clerkship with the same

kind of energy, curiosity, commitment, and smarts. I recommend him enthusiastically.

Sincerely,

David A. Strauss

Gerald Ratner Distinguished Service Professor of Law

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Dylan Moore

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The following writing sample is a student Comment recently selected for publication in *The University of Chicago Legal Forum*. It discusses and categorizes state workers' compensation policies as applied to pandemic diseases in the wake of COVID-19. Following an agreement between businesses and laborers in the early 1900s, all states require private employers to carry workers' compensation insurance. Colloquially, this agreement is known as the Grand Bargain. The extent of coverage across states, however, varies significantly. This is especially true in the context of pandemic diseases, as some states have been more proactive than others in extending coverage in the wake of COVID-19. Drawing on historical, economic, and normative analysis, the Comment suggests that states should adopt a presumption of workers' compensation coverage for certain public-facing essential employees during pandemics.

This Comment has received helpful feedback from *Legal Forum* staff, but all writing and edits are my own. Some sections of the Comment have been omitted for brevity, but a full copy is available upon request. Thank you for your consideration.

STRIKING A NEW GRAND BARGAIN: WORKERS' COMPENSATION AS A PANDEMIC SOCIAL SAFETY NET

Dylan Moore

I. INTRODUCTION

[This section has been omitted for brevity.]

II. STATE APPROACHES TO COVID-19 WORKERS' COMPENSATION: A CONTINUUM OF COVERAGE

Legal analysts have had difficulty determining whether most state workers' compensation and occupational disease statutes will cover COVID-19 cases.[1] The statutes are often vague[2] and have not been tested with a disease as widespread and contagious as COVID-19. While some states have adopted legislative policy changes or executive orders altering the landscape of their workers' compensation coverage following the COVID-19 outbreak,[3] others have left their workers' compensation systems unaltered.[4] Considering both preexisting occupational disease laws and recent changes intended to expand the range of coverage, four distinct categories of state policy emerge. The categories range from states which are most likely to cover a large number of workers who contract COVID-19 to states where workers' compensation coverage for COVID-19 is outright impossible.

First, in likely coverage states, some combination of existing occupational disease law and emergency response to COVID-19 makes coverage for many infected employees likely. Second are selective coverage states, in which certain professionals—usually first responders and health care workers—are expressly presumed to enjoy workers' compensation coverage while other workers'

[1] *See, e.g.*, Brodie Butland, *Liability for Employees' COVID-19 Exposure Is Hard to Gauge*, LAW360 (April 23, 2020), https://www.law360.com/articles/1265657/liability-for-employees-covid-19-exposure-is-hard-to-gauge [https://perma.cc/JL6A-UFZX].
[2] Many states, recognizing the lack of clarity in their workers' compensation or occupational disease statute, have also published schedules of representative occupational diseases. While not generally exhaustive, these lists are intended to bring clarity to the vague statutes. *See, e.g.*, OHIO REV. CODE ANN. § 4123.68 (LexisNexis 2020).
[3] *See, e.g.*, Ark. Exec. Order No. 20-35 (Jun. 15, 2020), https://perma.cc/7ZT4-MSC6 (expanding Arkansas's definition of occupational diseases to include COVID-19).
[4] *See, e.g.*, S.B. 8007, 111th Gen. Assemb., 2d Extraordinary Sess. (Tenn. 2020) (failed in Senate Commerce and Labor Committee) (attempting to classify COVID-19 as an occupational disease).

coverage status remains uncertain or unlikely. Third are uncertain coverage states, which have not adopted emergency measures extending a presumption of coverage to anyone following the outbreak of COVID-19 and whose statutes could plausibly—though by no means certainly—extend coverage to some infected workers. Finally, unlikely coverage states have statutory provisions that make COVID-19 coverage doubtful or outright impossible.

[The remainder of this section, which dives into greater detail about the four types of state workers' compensation regimes, has been omitted for brevity.]

III. FULFILLING THE HISTORICAL PROMISE OF THE GRAND BARGAIN

Many essential workers who contract COVID-19 through the course of their employment will not receive workers' compensation. To remedy this problem for future pandemics, states should adopt a selective coverage policy in preparation for the next pandemic, extending a presumption of coverage to public-facing essential workers in enumerated professions. A selective coverage approach is well-grounded in the history undergirding workers' compensation. Further, this approach would bring occupational disease doctrine—which has seen an underwhelming development since laborers and employers first struck the Grand Bargain—in line with traditional workers' compensation law. To better explain why current occupational disease law fails to live up to its historical promise, this Part begins with a brief history of workers' compensation law. It then calls for states to honor the history and intent of the Grand Bargain by adopting a selective coverage approach for future pandemics.

A. The Grand Bargain's proud history and disappointing execution

Prior to the widespread adoption of workers' compensation laws in the early 1900s, American employers were technically liable through tort litigation for negligence resulting in injuries to employees, but workers rarely succeeded in these lawsuits.[5] During this era, an employee's sole remedy when injured

[5] P. Blake Keating, *Historical Origins of Workmen's Compensation Laws in the United States: Implementing the European Social Insurance Idea*, 24 WORKERS' COMP. L. REV. 135, 136 (2002).

on the job was to sue her employer.[6] Although employers did have the duty to provide workers with a reasonably safe place to work, workplace negligence lawsuits were often unsuccessful because employers had access to three powerful legal defenses which would absolve them of liability, even if they had breached this duty.[7] Employers would not be liable if: 1) A worker's injury resulted from the negligence of a fellow worker; 2) The injury was due to an inherent danger of the job which the worker knew or should have known about; or 3) The worker was also negligent in any way.[8] These three defenses were known as the "fellow servant rule," the "assumption of risk," and "contributory negligence," respectively, and scholars often refer to them as the "unholy trinity."[9] Together, the unholy trinity made it exceedingly unlikely that an injured employee could bring a successful negligence suit against her employer.[10]

As the United States industrialized near the turn of the century, workers found themselves involved in more accidents that were essentially attributable to chance rather than the fault of the worker or employer.[11] The population boomed, the country urbanized, and a greater proportion of individuals found themselves working in intolerable factory conditions, which led to a struggling middle class and widespread calls for reform.[12] Workers' compensation laws, which arose as a response to the increased workplace injuries concomitant with repetitive industrial work, came to be known colloquially as the "Grand Bargain."[13]

The Grand Bargain made both employers and laborers better off. While workers gave up their right to bring negligence suits in exchange for surefire (though less substantial) compensation for workplace injuries, employers and insurers mollified an increasingly dissatisfied middle-class

[6] *Id.*
[7] *Id.*
[8] *Id.* at 136–37.
[9] *Id.*
[10] *See* Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS U.L. REV. 891, 901 n.35 (2017).
[11] Keating, *supra* note 5, at 135.
[12] *Id.* at 148–49.
[13] For an interesting look into the history of the term itself, see Spieler, *supra* note 10, at 893 n.4.

workforce.[14] The Grand Bargain also allowed employers to meaningfully lower nonunion wages in exchange for providing workers' compensation coverage.[15] In addition, the Grand Bargain decreased employers' uncertainty associated with negligence lawsuits—by 1913, twenty-five states had already chipped away at the power of the unholy trinity to shield employers from liability by enacting laws which lessened the strength of employers' negligence defenses.[16] This marked more than a three-fold increase in such laws since the beginning of the century.[17] The coincidence of increased media attention to dangerous working conditions and increasingly labor-friendly employer negligence standards convinced employers that predictable workers' compensation payouts would be a better alternative to the roulette wheel of tort lawsuits.[18] Consequently, the Grand Bargain marked an important historical moment in the evolution of the United States—it was one of the country's first widespread programs of social insurance.[19] By 1920, all but eight states had adopted a workers' compensation statute.[20]

Though the institution of workers' compensation laws was a hard-fought victory for laborers, adequate coverage of occupational diseases has proven much more difficult to achieve.[21] The majority of early workers' compensation laws simply did not contemplate occupational diseases.[22] Because these early statutes were largely a reaction to increasingly common industrial accidents, they were not well-suited to handle the often slower and less detectable onset of occupational diseases.[23] Over time, even as all states eventually adopted coverage for occupational diseases, a two-tiered system of workers' compensation developed: workplace accidents leading to obvious bodily injury are often compensated

[14] *See* Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 307–10 (1998).
[15] *Id.*
[16] *Id.* at 316.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 306.
[20] Keating, *supra* note 5, at 152, 157. Mississippi was the last state to adopt a workers' compensation law—it did so in 1949. *Id.* at 157.
[21] *See* Albert Kutchins, *The Most Exclusive Remedy Is No Remedy at All: Workers' Compensation Coverage for Occupational Diseases*, 32 LAB. L.J. 212 (1981).
[22] *See* Spieler, *supra* note 10, at 910.
[23] Kutchins, *supra* note 21, at 213.

adequately, but workers' compensation payouts for occupational diseases have been paltry and infrequent in comparison.[24]

Even now, employees who have fallen ill with clearly compensable occupational diseases face substantial barriers to financial recovery.[25] In some states, the denial rate for occupational disease claims can be up to three times higher than the rate for injury claims.[26] This asymmetric treatment between diseases and injuries leads to an increased burden on Medicare and the families of workers who have contracted an occupational disease and a decreased burden on employers.[27]

B. Modernizing occupational disease law as a pandemic social safety net

Although the Grand Bargain was struck to give workers reliable access to adequate funds when they have been harmed through their employment,[28] occupational disease laws have largely failed to live up to this promise.[29] Claims for occupational disease take longer, are less frequently successful, and generally pay less handsomely compared to claims for injury.[30] Because workers' compensation largely arose out of a response to industrialization's dangerous working conditions, the relevant state statutes generally contain stringent causation requirements that are much harder for a worker to satisfy when she falls ill as opposed to when she is maimed on the job.[31]

Notwithstanding the difficulties associated with occupational disease recovery generally, many state workers' compensation schemes are even less equipped to provide benefits to workers who contracted a global pandemic virus due to their employment. Unlikely coverage states in particular

[24] *Id.* at 221; *see also* Jeff Biddle et al., *What Percentage of Workers with Work-Related Illnesses Receive Workers' Compensation Benefits?*, 40 J. OCCUPATIONAL & ENV'T. MED. 325, 325–31 (1998).
[25] *See, e.g.*, Jamie Smith Hopkins, *Disease Victims often Shut out of Workers' Comp System*, CTR. FOR PUB. INTEGRITY (Nov. 4, 2015), https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/disease-victims-often-shut-out-of-workers-comp-system [https://perma.cc/46Z2-2YUJ].
[26] *Id.*
[27] *See* J. Paul Leigh & James P. Marcin, *Workers' Compensation Benefits & Shifting Costs for Occupational Injury & Illness*, 54 J. OCCUPATIONAL & ENV'T MED. 445, 447 (2012).
[28] *See* Fishback & Kantor, *supra* note 14, at 307–10.
[29] *See* Spieler, *supra* note 10, at 996.
[30] Biddle et al., *supra* note 24, at 325–31.
[31] Kutchins, *supra* note 21, at 213.

neglect even the most important workers—health care professionals and first responders—who have the highest likelihood of contracting COVID-19 at work.[32] Even the labor-friendly statutes found in selective and likely coverage states sometimes require causal proof that the employee's work materially contributed to the onset of the disease.[33] Considering the insufficient state of national contact tracing, it seems difficult for an individual to pinpoint exactly when and where she contracted COVID-19.[34] Despite this, workers who have actually contracted COVID-19 through their employment but enjoy no presumption of coverage are more often than not expected to provide causal evidence that they contracted the disease through their workplace rather than on a trip to the grocery store or at a socially distanced gathering—a burden which proves almost completely unworkable in the context of a pandemic.

This inability to pinpoint the moment of exposure may explain why workers' compensation claims are less frequent than analysts and insurers anticipated in the early aftermath of the outbreak.[35] While this may be good news for actuaries, it leaves a substantial number of employees who likely contracted COVID-19 at work without any adequate remedy or access to compensation. In uncertain and unlikely coverage states, there will frequently be no straightforward process for workers—even health care workers—to satisfy the statutory requirements to receive compensation. In Georgia, for instance, front-line doctors and nurses seemingly have no chance at recovery.[36] Although it is technically possible for workers to bring tort claims against their employers alleging negligence, wrongful death, or unsafe

[32] *See, e.g.*, GA. CODE ANN. § 34-9-280(2)(C) (2020).
[33] *See, e.g.*, *Universal Foundry Co. v. Wisconsin Dep't of Indus., Lab. & Hum. Rel.*, 263 N.W.2d 172, 177 (Wis. 1978).
[34] *See* Selena Simmons-Duffin, *Coronavirus Cases Are Surging. The Contact Tracing Workforce Is Not.*, NPR (Aug. 7, 2020), https://www.npr.org/sections/health-shots/2020/08/07/899954832/coronavirus-cases-are-surging-the-contact-tracing-workforce-is-not [https://perma.cc/V3NX-Y786]; *see also* Ashley Hagen, *COVID-19 Transmission Dynamics*, AM. SOC'Y FOR MICROBIOLOGY (Apr. 20, 2020), https://asm.org/Articles/2020/April/COVID-19-Transmission-Dynamics [https://perma.cc/9FGE-DRJY] ("Transmission dynamics of SARS-CoV-2 have generated a significant amount of debate since the emergence of the virus in late 2019. One reason for this is simply a lack of evidence.").
[35] *See* Joseph Paduda, *The Impact of COVID-19 and Employment Changes on Workers' Compensation*, HEALTH STRATEGY ASSOCS. (Jun. 24, 2020), https://www.healthstrategyassoc.com/wp-content/uploads/2020/06/HSA-COVID-Survey-Abridged-FINAL.pdf?utm_source=website&utm_medium=download&utm_campaign=covid_followup [https://perma.cc/E6GF-92Z5].
[36] § 34-9-280(2)(C).

working conditions in unlikely coverage states, few lawsuits have been filed.[37] This system tarnishes the legacy of the Grand Bargain and reduces one of America's oldest social safety nets to mere lip service in the context of such a serious disruption to the workforce.

In response to COVID-19, however, certain states have shown that adequate workers' compensation coverage is possible and politically feasible. Likely coverage states, selective coverage states, and the federal government have extended explicit presumptions of workers' compensation coverage to at least some workers. These governments are working to peel off the layer of uncertainty that shrouds typical occupational disease claims[38] and that will only be exacerbated by the COVID-19 outbreak.[39]

Critics may contend that widespread adoption of presumptions of coverage will clog the workers' compensation system, drain insurers, and incentivize false claims. Emerging analyses of claims in the aftermath of the COVID-19 pandemic, however, suggest that this fear is widely overblown.[40] A study published in October 2020 found that the impact of COVID-19 on the workers' compensation system has not been nearly as costly for insurers and employers as many early projections forecasted.[41] While COVID-19-related claims have placed some financial strain on the system, their impact has largely been outpaced by the decline in other workers' compensation claims due to increased remote work.[42] In addition, most COVID-19 claims are relatively inexpensive—one insurer responding to a survey reported that over ninety-five percent of its COVID-19 claims cost under $3,500 to cover.[43] Although the full cost

[37] As of February 5, 2021, only three COVID-19 employment lawsuits alleging negligence, wrongful death, or an unsafe workplace have been filed in Georgia, Kansas, and Oregon (three unlikely coverage states) combined. *See COVID-19 Employment Litigation Tracker and Alerts*, FISHER PHILLIPS LLP (last visited Feb. 14, 2021), https://www.fisherphillips.com/covid-19-litigation [https://perma.cc/2L4L-RM35].
[38] *See, e.g.*, Hopkins, *supra* note 25.
[39] *See, e.g.*, Butland, *supra* note 1.
[40] *See* MARSH LLC, COVID-19's IMPACT ON WORKERS' COMPENSATION MARKET IS MINIMAL, BUT CHALLENGES PERSIST 3–4 (2020), https://www.mmc.com/content/dam/mmc-web/insights/publications/2020/december/COVID19_Impact_on_WC_10_2020.pdf [https://perma.cc/Z2NB-CJ2A].
[41] *Id.* at 1–2.
[42] *Id.* at 3.
[43] *Id.* at 4.

of COVID-19 claims to the workers' compensation system remains unclear, these early estimates suggest that future comprehensive pandemic coverage can be achieved without placing undue strain on the system.

In future pandemics, workers ought not be left uncertain as to whether they will have access to adequate compensation when risking their health to keep essential corporations running. At a minimum, states should be more explicit about the outer bounds of their occupational disease coverage in the context of pandemics so that workers can adequately forecast whether they will have access to coverage should they fall ill on the job. More desirable, however, would be a state-level shift from mercurial and toothless occupational disease coverage toward a more robust system of worker protection.

To preserve the historical promise of the Grand Bargain and protect the employees who risk their own health to keep society running during a pandemic, states should adopt a selective coverage approach, extending a presumption of coverage to an enumerated list of essential employees in public-facing positions. States could explore several avenues for crafting a list of professions that should receive the presumption.

First, they could analyze a sample of other states' essential worker lists and establish presumptions of coverage for professions that states seem to agree are essential. Alternatively, states could look to the Centers for Disease Control and Prevention ("CDC") Advisory Committee on Immunization Practices's categorization of essential workers.[44] It would be reasonable for states to extend the presumption of coverage to all employees working in Phase 1a and 1b industries of the CDC's recommended vaccination schedule. This would presume coverage for employees such as health care workers, elementary educators, and grocery store clerks who put themselves in harm's way after a

[44] *Interim List of Categories of Essential Workers Mapped to Standardized Industry Codes and Titles*, CTRS. FOR DISEASE CONTROL & PREVENTION (last visited Feb. 13, 2021), https://www.cdc.gov/vaccines/covid-19/categories-essential-workers.html [https://perma.cc/T8G4-NW4T].

pandemic outbreak. A nurse should not have to face financial uncertainty when she falls ill with the very disease that the entire world is mobilized to combat.

Additionally, if employees and the public at large perceive that businesses are unjustly enriched by laborers who put their lives on the line to keep society running amid a global pandemic, businesses may see a large-scale push for more employee-friendly court doctrines and state laws similar to the original workers' compensation movement of the early 1900s. Businesses may be able to mitigate the severity of these laws if they support the widespread adoption of a selective coverage workers' compensation approach in future pandemics, just as they were able to come to an agreement with laborers concerning the original adoption of workers' compensation laws.[45] By accepting a selective coverage future, businesses will be better positioned to calculate risk when the next pandemic hits.

More widespread explicit protections—like the Illinois statute offering a presumption of coverage to every essential worker that contracts COVID-19[46]—would be preferable for laborers, but this level of coverage would likely be a harder sell for corporations and insurers, especially considering the wide swath of businesses dubiously deemed essential in some states.[47] Some states have clearly shown interest group preferences when determining which industries are essential,[48] and not all these professions are equally deserving of a presumption of coverage. However, extending a presumption to the most public-facing essential workers—like grocery store clerks and health care professionals—is likely an uncontroversial policy change in line with the sentiment undergirding the Grand Bargain. States would be normatively remiss to leave such critical workers without financial security following a pandemic.

[45] *See* Fishback & Kantor, *supra* note 14, at 307–10.
[46] 820 ILL. COMP. STAT. ANN. 310/1(g) (LexisNexis 2020).
[47] In Arizona, for instance, golf courses were deemed essential. *See* Nick Hedges, *Over Par: Arizona's Golf Scene Thrives During COVID-19 Pandemic*, CRONKITE NEWS (Dec. 15, 2020), https://cronkitenews.azpbs.org/2020/12/15/over-par-arizonas-golf-scene-thrives-during-covid-19-pandemic/ [https://perma.cc/5MCX-7QWD].
[48] *Id.*

Some businesses may shortsightedly wish to see a pandemic workers' compensation landscape that mirrors the pre-Grand Bargain era of workplace liability, laden with uncertainty. An employer who knows that her employee may have contracted a pandemic virus during the course of the workday could nonetheless want the case to go to court, knowing that it will be difficult for the employee to prove that her work environment caused her to contract the virus. This mindset would be a mistake. While a return to a tort liability system would likely lead to fewer payouts from the employer's and insurer's perspectives, the employer would lose massive social credibility and could leave itself open to large, infrequent judgments against it. Many employers supported the original Grand Bargain because it quelled an unhappy labor force and general public, both angry that workers were not adequately compensated for putting themselves in harm's way.[49] Similarly, today's image-conscious firms should welcome the opportunity to strike a new Grand Bargain and avoid uncertainty in future pandemics. This would allow them to have a hand in shaping workers' compensation policy moving forward and avoid negative press[50] that may ultimately tarnish their image.

IV. ECONOMIC CONSIDERATIONS JUSTIFYING A NEW GRAND BARGAIN

Aside from honoring the Grand Bargain's legacy and modernizing occupational disease doctrine, a selective coverage approach to workers' compensation policy is economically desirable. This Part advances two economic arguments suggesting that states adopt a selective coverage workers' compensation policy: efficient burden allocation and the elimination of market uncertainty. In the absence of meaningful government intervention to provide for workers who fall ill with a pandemic virus, workers' compensation can serve as a workable means to ensure that employees critical to the continuation of society do not bear the economic burden of their illness. Notwithstanding the coverage

[49] *See* Fishback & Kantor, *supra* note 14, at 316.
[50] *See, e.g.*, Shannon Bond, *'We're Out There' so Protect Us, Protesting Workers Tell Amazon, Target, Instacart*, NPR (May 1, 2020), https://www.npr.org/2020/05/01/849218750/workers-walk-off-jobs-demand-safer-working-conditions [https://perma.cc/ZTY3-RUQH].

scheme states ultimately adopt, they should be more explicit in explaining how their workers' compensation statutes will handle future pandemics.

A. Burden allocation and cost balancing

Employees who put their health on the line to keep critical businesses open during the pandemic ought not bear the costs should they fall ill. Though the COVID-19 pandemic has been hard on certain sectors of the United States economy, many essential businesses have benefitted greatly from a dogged workforce.[51] Here, too, states would do well to adopt a selective coverage policy, extending a presumption of coverage to public-facing essential workers. From an efficiency standpoint, states should lay the cost of diseased essential workers upon the corporation, which has a higher ability to pay and is more likely to have insurance, rather than the infected workers themselves. States which thoughtfully weigh employees' interests and ability to pay against those of their employers will find that the employers are better situated to bear the costs of pandemic coverage. Large businesses that have been able to turn a profit during the pandemic through the use of an in-person workforce are simply in a better position to pay insurance deductibles than the employees who must put themselves at risk for their once-safe livelihood.

It seems normatively perverse for employers to profit from their employees' work during a pandemic while shouldering none of the cost. A hospital that employs a nurse who falls ill through treating emergency COVID-19 patients, for instance, reaps the benefits of the nurse's labor. Further, the hospital almost certainly enjoys a higher ability to pay for the nurse's insurance deductibles than the nurse herself. This rings especially true in light of the fact that most individuals have received only $3,200 in stimulus money following the COVID-19 pandemic while large businesses have access to much more

[51] *See generally* Kim Hjelmgaard, *As Coronavirus Ruined the US Economy, These Companies Reaped 'Dramatic Profits,' Study Says*, USA TODAY (Jul. 22, 2020), https://www.usatoday.com/story/news/2020/07/22/coronavirus-handful-american-companies-strike-gold-amid-pandemic/5477904002/ [https://perma.cc/X9GZ-DARY].

liquid stimulus packages.[52] Although much of the federal money that businesses received to mitigate COVID-19-related losses was intended to cover payroll, businesses have no obligation to use the money for that purpose.[53]

Scholars have long pointed out that taxpayers end up shouldering much of the costs left over after inadequate workers' compensation payouts.[54] In 2007, for instance, total workers' compensation payouts for medical care hovered just under $30 billion.[55] This may seem substantial, but workers' compensation actually grossly underfunded its claimants' medical costs, leaving non-workers' compensation insurance, Medicare, and Medicaid to foot the bill.[56] Together, these three other insurance systems paid just under $27 billion to cover the medical costs that workers' compensation failed to address.[57] Although workers' compensation also paid out roughly $22 billion in indemnity benefits,[58] taxpayers and other members of injured employees' private insurance risk pools picked up the bill for the insufficiencies present in workers' compensation medical payouts.

If workers' compensation fails to adequately cover the medical costs associated with employees contracting a pandemic virus while on the job, taxpayers and the privately insured will likely bear these costs through increased taxes and premiums, respectively. While essential workers no doubt contribute to society as a whole by working in person during a pandemic, they are also generating increased revenue for their employers. The increased risk they incur should be internalized not by taxpayers, many of whom are likely struggling financially themselves due to the economic effects of the pandemic. Instead, the

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[52] *See* Peter Whoriskey, Douglas MacMillan & Jonathan O'Connel, *'Doomed to Fail': Why a $4 Trillion Bailout Couldn't Revive the American Economy*, WASHINGTON POST (Oct. 5, 2020), https://www.washingtonpost.com/graphics/2020/business/coronavirus-bailout-spending/ [https://perma.cc/W5VP-WBLC].
[53] *Id.* ("[W]hile a complete accounting of the $670 billion Paycheck Protection Program isn't likely to be available for months or years, companies that received the money were not compelled to use it to protect paychecks — and many didn't.").
[54] Alison Morantz et al., *Economic Incentives in Workers' Compensation: A Holistic, International Perspective*, 69 RUTGERS U.L. REV. 1015, 1065–66 (2016).
[55] J. Paul Leigh & James P. Marcin, *Workers' Compensation Benefits and Shifting Costs for Occupational Injury and Illness*, 54 J. OCCUPATIONAL & ENV'T MED. 445, 447–48 (2012).
[56] *Id.*
[57] *Id.*
[58] *Id.*

burden should fall to the corporations that are able to continue operation in the midst of government-mandated lockdowns. Although a workers' compensation solution would likely not fully reimburse workers who contract a pandemic virus, it would at least provide them with some surefire financial security during a turbulent time. Further, a selective coverage workers' compensation scheme would allocate the bulk of the burden to the entity most likely to realize a direct pecuniary gain stemming from the employee's continued in-person labor.

Critics may argue that many employers—specifically, smaller employers—will not have the resources to pay workers' compensation deductibles when they themselves are struggling during the next pandemic. This is a valid concern, as many small businesses such as restaurants have been forced to close their doors permanently due to poor market conditions following the COVID-19 pandemic.[59] However, this concern will be less pressing should states adopt a competent selective coverage approach and extend the presumption of coverage to only public-facing essential employees working in specific industries.

Although some states have made questionable choices[60] in defining which businesses should be considered essential, the overlap in essential business classifications between states suggests that workers in a few key industries should receive the presumption of coverage.[61] Unsurprisingly, states agree that health care providers, grocery stores, and their concomitant supply chains, for instance, must remain open for society to function in the middle of a pandemic.[62] Though the exact contours of any list of essential workers will be difficult to determine at the margins, it seems uncontroversial to list these industries as essential and protect the workers involved in their continued operation. Many employers within these industries are large corporations that are likely in a better position to internalize the costs of workers'

[59] *See* Noam Scheiber, *Pandemic Closures Devastate Restaurant Industry's Middle Class*, N.Y. TIMES (Dec. 9, 2020), https://www.nytimes.com/2020/12/09/business/pandemic-restaurant-middle-class.html [https://perma.cc/M7Q5-Q27J].
[60] *See, e.g.*, Hedges, *supra* note 47.
[61] *See* Scottie Andrew, *What Constitutes 'Essential Businesses'? States seem to Have Varying Standards*, CNN (Mar. 26, 2020), https://www.cnn.com/2020/03/25/business/essential-businesses-states-coronavirus-trnd/index.html [https://perma.cc/E9XM-R746].
[62] *Id.*